No. 15-1194

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is:

Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina (App., *infra*, 1a-35a) is reported at 777 S.E.2d 738. The opinion of the Court of Appeals (App., *infra*, 36a-53a) is reported at 748 S.E.2d 146. The order of the Superior Court (App., *infra*, 54a-65a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 6, 2015. On January 20, 2016, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." N.C. Gen. Stat. § 14-202.5 is reproduced in the appendix to this petition. App., *infra*, 66a-67a.

STATEMENT

1. Two decades ago, North Carolina, invoking the State's "paramount" interest in protecting the public from sex offenses and the risks of recidivism, enacted a law requiring residents previously convicted of certain sexual and other offenses to provide law enforcement with up-to-date identification and residency information, which is compiled and made

available to the public on a centralized registry. See N.C. Gen. Stat. §§ 14-208.5 *et seq.* (declaring law's "purpose" of assisting law enforcement and the general public by supplying timely and accurate information). See generally N.C. Dep't of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* ("Registry Overview") 11-12 (Sep. 2014).

As have legislatures elsewhere, the North Carolina General Assembly has amended its laws repeatedly in the past decade, adding to the list of "reportable" offenses; imposing more extensive and longer-lasting reporting obligations and broader dissemination; and providing harsher penalties for violations. The Legislature has also enacted an array of rules regulating where registrants lawfully may work, reside, or "be," *e.g.*, N.C. Gen. Stat. § 14-208.18. See Registry Overview at 11-17. Thus, where it might formerly have been said that persons "subject to [North Carolina's] statute [were] free to move where they wish and to live and work as other citizens, with no supervision," *Smith* v. *Doe*, 538 U.S. 84, 87 (2003), registrants now confront a dense thicket of restrictions, backed by criminal penalties.

2. In 2008, as part of legislation aimed at making North Carolina "one of the toughest states, if not the toughest state," in its dealings with those on its registry, the General Assembly enacted N.C. Gen. Stat. § 14-202.5, restricting registrants' internet use. Whitney Woodward, *State Legislators Approve "Jessica's Law,"* Greensboro News and Record, July 17, 2008.

Although an initial version of the law would have imposed obligations on "social networking website" *operators* to ensure that minors obtain adult permission before establishing accounts and afford parents ongoing access, see S.B. 132 § 8, 2007 Gen. Assemb., Reg. Sess. (N.C. 2007), those provisions ultimately were omitted, in favor of one that makes it a felony for persons on the State's registry to "access" any commercial website that [1] "facilitates the social introduction" of people [2] for, *inter alia*, "purposes of * * * information exchanges"; [3] allows users to create "personal profiles" with a name or picture; and [4] provides them ways to "communicate with other users"—provided the site is "know[n]" to not restrict "member[ship]" to adults. N.C. Gen. Stat. § 14-202.5(a), (b). The measure was approved by unanimous votes in both Houses of the General Assembly. See N.C. Gen. Assemb., 2007-2008 Sess., S. Roll Call 1773 (Jul. 18, 2008); *id.* H. Roll Call 1929 (Jul. 18, 2008).

Section 202.5 applies to every person on the registry, including the large numbers who are neither incarcerated nor under criminal justice supervision;[1] and those whose convictions were for nonsexual reportable offenses, and offenses not involving minors, see, *e.g.*, N.C. Gen. Stat. § 14-208.6(d) (requiring registration by those convicted of disseminating "a photographic image of another person underneath or through the clothing," *id.* § 14-202(e)). The statutory criteria have been understood to sweep in many sites not "normally thought of as

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[1] See *Offender Statistics*, N.C. Dep't of Pub. Safety, http://sexoffender.ncsbi.gov/stats.aspx (last visited Mar. 16, 2016).

'social networking' sites," Pet. App. 33a (Hudson, J., dissenting) (citing foodnetwork.com, nytimes.com, amazon.com, and google.com); see *Crime Briefs*, The News Reporter, Feb. 1, 2016 at 4A (reporting prosecution for accessing YouTube). The prohibition does not extend, however, to websites that provide a *single* "discrete service[]," such as "photo-sharing," "electronic mail," "instant messenger," or a "chat room or message board platform" or to ones that "primar[il]y" enable "commercial transactions involving goods or services between [their] members." N.C. Gen. Stat. § 14-202.5(c)(1), (2).

3. Petitioner Lester Packingham was prosecuted and convicted under Section 202.5 for "accessing" Facebook.com in 2010.

Petitioner's registration arose from his 2002 guilty plea, as a 21-year-old student with no prior criminal record, to a single count of taking indecent liberties with a minor, N.C. Gen. Stat. § 14.202.1. See Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sep. 16, 2002) (A.O.C. Form 603), at 1. That conviction resulted in a sentence of 10-12 months, followed by 24 months' supervised release, during which time petitioner was subject to "standard conditions" requiring, *e.g.*, that he register, submit to warrantless searches, refrain from illegal substance use, and avoid contact with the complainant. *Id.* 1-3. Apart from directing that petitioner "remain away from" that young woman during the two-year period, the sentencing court imposed no further "special conditions." *Id.* 2.

In April 2010, a Durham police officer came across petitioner's Facebook account and the following "post":

> Man God is Good! How about I got so much favor they dismiss the ticket before court even started. No fine, No court costs, no nothing spent....Praise be to GOD, WOW! Thanks JESUS!

C.A. Rec. 77. That led the officer to arrest petitioner on charges of violating Section 202.5. (Although authorities obtained a warrant and searched petitioner's home, computer, and thumb drives, the only evidence of "access" presented at his criminal trial was a print-out of this one post. See C.A. Rec. 74-77).

a. Petitioner moved to dismiss the charge on First Amendment grounds. The trial court denied that motion, emphasizing the Legislature's responsibility to weigh "disparate interests and to forge a workable compromise," Pet. App. 60a (quoting *State* v. *Bryant*, 359 N.C. 554, 565 (2005)), and concluding that the "balance" Section 202.5 strikes, between "activities of sex offenders" and "protection of minors," was constitutionally permissible, *id.* 64a. Petitioner stood trial, and a jury convicted him of criminal "access."

b. The North Carolina Court of Appeals overturned petitioner's conviction, unanimously holding Section 202.5 unconstitutional, both on its face and as applied.

The court highlighted similarities between Section 202.5 and "social media bans" of other States that had been held unconstitutional by federal courts. See Pet. App. 44a-46a (citing *Doe* v. *Prosecutor, Marion*

County, 705 F.3d 694 (7th Cir. 2013), *Doe* v. *Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012), and *Doe* v. *Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012)). Like those laws, the court explained, Section 202.5 has an undeniably legitimate purpose—protecting minors from harm—and is "content neutral," in that it does not suppress expression based on its subject or viewpoint. Pet. App. 42a. But like those laws, the court held, Section 202.5 impermissibly "prohibit[s] an enormous amount of expressive activity on the internet," *id.* 46a, including much that is plainly "unrelated to online communication with minors." *Id.* 51a. See also *ibid.* (explaining that Section 202.5 "could be interpreted to ban registered sex offenders from * * * conducting a 'Google' search [or] purchasing items on Amazon.com").

c. The State sought review from the North Carolina Supreme Court, pointing to a feature of Section 202.5 it claimed the appellate court overlooked: While other States' laws sought to prevent registrants from using social networking sites to "contact" minors for improper purposes, the State urged, North Carolina's measure aimed to prevent "information gathering," which could enable predators to "target" young people for criminal purposes. Pet. Discretionary Review 11-12.

The State Supreme Court granted review, and, over vigorous dissent, held Section 202.5 to be "constitutional in all respects." Pet. App. 2a. The court first held that the law should be analyzed as a "limitation on conduct," rather than a speech restriction, *id.* 9a, because it prohibits registrants from "access[ing]" proscribed websites, *id.*, so that the burdens on their ability "to engage in speech on the

Internet" were "incidental[]." *Id.* 12a. The court then accepted the State's asserted interest in "forestall[ing] illicit lurking and contact" by "prevent[ing] registered sex offenders" from "harvest[ing] information," concluding that these are "unrelated to the suppression of free speech." *Id.* 13a-14a.

The court then held that Section 202.5 is "not substantially broader than necessary to achieve the government's interest." Pet. App. 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989)), and therefore "sufficiently narrowly tailored." *Id.* 16a. Although the law "could have been drafted even more narrowly," the court emphasized, it fell well short of "imposing a blanket prohibition against Internet use," *id.* 15a. While "numerous well-known Websites" are foreclosed, the majority continued, Section 202.5 "leaves open ample alternatives," noting that though registrants' "access[ing]" the New York Times website (which does not have an adults-only policy) could give rise to prosecution, they "may [still] follow current events on WRAL.com," the local NBC affiliate's website. *Id.*17a-18a. For similar reasons, the court explained, the statute did not fail as overbroad: Registrants "are prohibited from accessing only those Web sites where they could actually gather information about minors to target" but are otherwise "free to use the Internet." *Id.* 25a.[2]

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[2] The court further held that Section 202.5 was constitutional "as applied," noting that petitioner's offense of conviction had involved a minor and describing his use of the name "J.r. Gerrard" on Facebook—along with a photograph of himself and his phone number—rather than his given name, Lester Gerard Packingham, Jr., as "disguis[ing] his identity,"

Justices Hudson and Beasley dissented, concluding that Section 202.5 is unconstitutional both on its face and as applied in convicting petitioner. Invoking "basic principles of freedom of speech," Pet. App. 28a (quoting *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011)), the dissent explained that Section 202.5 "regulates First-Amendment-protected activity," "directly"—not "'incidental[ly]'"—and does so with "alarming breadth," by "completely barr[ing]" a class of citizens "from communicating with others through many widely utilized commercial networking sites." *Ibid.* Whether or not Section 202.5 warranted strict First Amendment scrutiny, the dissent explained, was of no moment; because North Carolina's law "burdens [so much] * * * more speech than necessary," it "c[ould] not survive" review under less demanding standards. *Id.* 34a.

REASONS FOR GRANTING THE PETITION

This Court's review is required to secure compliance with core First Amendment principles that should have restrained North Carolina's legislature and Supreme Court but did not.

The constitutional defects of the law under which petitioner (and more than 1,000 others) was prosecuted are not subtle or "marginal." Pet. App. 25a. Rather, Section 202.5's affronts to First Amendment principle are basic and serious: The statute singles out a subclass of persons, who are subject to criminal punishment based on expressive, associational, and communicative activities at the heart of the First Amendment, without any

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"indicating his awareness that he was indulging in forbidden behavior." Pet. App. 22a.

requirement that their activity caused any harm or was intended to.

As surely as Section 202.5 should never have been enacted, it should not have been upheld by the State's Supreme Court. This Court's decisions establish that the Freedom of Speech guaranteed by the Constitution requires that all laws regulating First Amendment activity—especially laws as far-reaching and strange as this one—be subject to serious judicial scrutiny, including measures enacted for no censorial purpose. And those precedents require that the judiciary hold officials seeking to suppress or punish First Amendment activity to the burden of showing that the government's purposes could not accomplished without speech regulation or through measures that are significantly less burdensome.

The North Carolina Supreme Court's decision here did the opposite. The court first postulated that Section 202.5 should be analyzed as mere "conduct regulation"—a premise not merely unsupported by, but subversive of, governing precedent. Just as all conduct may be said to contain "a kernel of expression," the inverse also holds true; and the edifice of First Amendment review could not long stand if laws prohibiting purchasing ink and paper were reviewed differently from laws forbidding publication of newspapers. Neither the State nor the decision below suggested that "access" to the proscribed websites is in itself of governmental concern, let alone an "evil"—only the activities, expression and gathering information, *i.e.* Speech, that some registrant might engage in.

The State Supreme Court then offered a species of "scrutiny" that could fairly be described as

intermediate in theory, but supine in fact. Its decision pronounced Section 202.5 "narrowly tailored" for one reason—"it could have been worse"—giving the Legislature credit for what it *did not do*, *i.e.*, enact a complete ban on internet use, but never considering whether the sweeping, onerous burdens the law *does impose* are necessary or why the State's concerns about communications with (or "gathering information" about) minors for nefarious purposes could not be pursued through measures—applicable to registrants and non-registrants alike—directly targeting that deplorable *behavior*.

Unsurprisingly, the decision is also irreconcilable with those of numerous federal courts, which have struck down on First Amendment grounds laws essentially indistinguishable from Section 202.5 as well as measures imposing *lesser* (and more carefully targeted) burdens. Those decisions proceed from a premise fundamentally different from the one evidently at work here: that persons who are no longer under criminal justice supervision are entitled to full, not watered-down, First Amendment protections. North Carolina's residents deserve the same.

That the decision below erred so seriously is not, however, reason for *withholding* this Court's review. Section 202.5 is no mere "silly law." See *Griswold* v. *Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). Tens of thousands of people are directly subject to Section 202.5's strictures, and the law is being actively enforced, through criminal prosecutions. The activities it proscribes are not only constitutionally protected but increasingly central to participation in civic, cultural, economic, and

spiritual affairs, and the burdens imposed extend to innumerable others who are denied opportunities to associate and communicate with those whom the law regulates directly.

Finally, the Court's intervention here would prod legislatures nationwide to more conscientiously uphold their responsibilities under the Constitution. Laws that abridge speech selectively—and single out misunderstood and unpopular classes of citizens—occupy an important position in this Court's decisions giving meaning to the First Amendment. And as attested by the ever-growing body of enactments harshly restricting registrants' liberties, it is hard to imagine a class of citizens *less able* than those targeted under Section 202.5 to safeguard their rights through the political process.

I. Both North Carolina's Law and The Decision Upholding It Disregard Constitutional First Principles

The state law under which petitioner was convicted is an alarming departure from our legal tradition and an "obvious and flagrant" violation of the First Amendment, *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

Section 202.5 targets *only* protected activity; it singles out a discrete and disfavored subset of the populace for far-reaching prohibitions, relegating them to "alternatives" the majority would never accept for itself. The law is prophylactic in a way this Court has long held the First Amendment to condemn: It categorically prevents vast swaths of protected activity, in the belief that some of it may be wrongful. See *Near* v. *Minnesota*, 283 U.S. 697 (1931).

And the legislation's basic theory—that the government's interests in preventing harmful *conduct* may be freely pursued through laws suppressing speech—is likewise one the Court has rejected time and again. "Even where the protection of children is the object, the [First Amendment's] limits on governmental action apply." *Brown*, 131 S. Ct. at 2741.

The measure, moreover, operates through the mechanism of the *criminal* law, authorizing punishment without requiring proof of either "an evil-meaning mind" *or* "an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 251-252 (1952). Under Section 202.5, undisputed proof that the accused *did not* have contact with (or "gather information" about) minors who maintain accounts on a website—or that he accessed the site solely for political or religious purposes—is wholly immaterial.

Indeed, the extent of the law's departure from basic norms may be seen simply by laying the facts of this case alongside those in this Court's First Amendment landmarks. While petitioner was convicted for saying "Thank you Jesus" on an internet site where teenagers (along with one billion adults) may maintain accounts—because *other registrants* might potentially access the site for improper communicative or information-gathering purposes—this Court, in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969), held the First Amendment to forbid punishment of a defendant whose speech leads to disorder, absent proof his expression is "[1] *directed* to inciting or producing [2] *imminent* lawless action *and* * * * [3] *likely* to produce such action." *Id.* at 447-448 (emphasis added). See also *Virginia* v. *Black*, 538

U.S. 343, 359 (2003) (First Amendment does not permit punishment for "serious[ly] express[ing] an intent to commit an act of unlawful violence to a particular * * * group of individuals," absent proof that the defendant "meant to" put the recipients in fear).[3]

In reaching a contrary result, the decision below spoke the language of this Court's modern First Amendment "tests." But those tests implement principles derived from the foundational precedents: that "regulating speech must be a last—not first—resort," *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), and that "if the Government *could* achieve its interests" without restricting speech, then it "*must* do so." *Id.* at 371 (emphasis added). Those decisions' requirements, on any honest reckoning, only highlight Section 202.5's unconstitutionality.

A. The State Supreme Court's Decision Upholding Section 202.5 as "Conduct Regulation" Is In Fundamental Conflict With This Court's Precedent

The North Carolina Supreme Court did not deny that expressive, communicative, and information-gathering activities over the proscribed internet sites

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[3] The decision below touted the requirement that a defendant be shown to "know[] that the site permits minor children to become members," N.C. Gen. Stat. § 14-202.5(a), as a *mens rea* limitation. Pet. App. 16a. But that provision has limited value in preventing convictions based on inadvertence, see Pet. App. 52a (appellate court's observation that "it is fundamentally impossible to expect [a registrant] * * * to 'know' whether he is banned from a particular Web site prior to 'accessing' it"), and it does nothing to "separat[e] wrongful conduct" from protected expression. *Elonis* v. *United States*, 135 S. Ct. 2001, 2010 (2015).

are fully protected under the Free Speech Clause. See *Reno* v. *ACLU*, 521 U.S. 844, 868-870 (1997). Nor did the court embrace—explicitly—the notion that the Free Speech rights of those targeted by Section 202.5 are, by virtue of their past convictions, diminished to mere "interests," to be freely "compromise[d]" by the Legislature. Cf. Pet. App. 60a (trial court decision). These freedoms, this Court has settled, "flow[] not from the beneficence of the state but from the inalienable rights of the person," *United States* v. *Alvarez*, 132 S. Ct. 2537, 2550 (2012), and are not "lost because * * * of [past] derelictions," *Near*, 283 U.S. at 720 (rejecting State's power to treat as "public nuisance[s]" periodicals that had previously published defamatory statements). See *Doe* v. *Harris*, 772 F.3d 563, 572 (9th Cir. 2014) (Bybee, J.) (affirming that individuals on registry but no longer under criminal justice supervision are entitled to "the full protection of the First Amendment").

The decision's error instead traces to the court's "starting point"—the startling assertion that Section 202.5 should be analyzed as regulating "conduct"—such that its onerous burdens were merely "incidental." Pet. App. 9a. Precedent and common sense condemn that supposition. Wholly unlike laws directed at activity that contains a bare "kernel of expression," Pet. App. 20a (quoting *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989)), or that "combine[s]" "'speech' and 'nonspeech' elements," *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (upholding measure protecting physical integrity of draft cards that applied to burning for protest purposes), Section 202.5 *only* addresses and punishes First Amendment activity—doing so out of concern that communicating

or gathering information on the internet may (in some cases) *lead to* misbehavior.

The decision offered various bases for its premise, suggesting (1) that the *ultimate* purpose of Section 202.5 is to prevent conduct, *i.e.*, criminal maltreatment of minors; (2) that, while "*communication*" on the prohibited sites is constitutionally protected, "gathering information"—the ostensible focus of Section 202.5—is regulable "conduct," see Pet. App. 18a-19a (distinguishing, *e.g.*, *Doe* v. *Marion County*); and (3) that "access[ing]" networking websites is "conduct" distinct from "posting" or "liking" (or reading) another user's post. Each rationale, however, is plainly refuted by this Court's governing precedent.

First, that the legislature's "essential" purpose, Pet. App. 9a, was "to limit conduct," *ibid.* rather than to suppress disfavored ideas, does not convert direct regulation of speech into an "incidental" burden. Many of the laws that this Court has invalidated under the Free Speech Clause were motivated by similar conduct-focused concerns. See, *e.g.*, *Brown*, 131 S. Ct. at 2739 (preventing violent behavior); *Brandenburg*, 395 U.S. at 448-449 (disorder); *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790 (1988) (fraud). The government's reason for denying the protest permit in *Forsyth Cnty.* v. *The Nationalist Movement*, 505 U.S. 123 (1992), may have been purely fiscal, but its action was speech regulation.

The North Carolina Supreme Court's assumption of a dispositive First Amendment difference between laws regulating "communication" and "information gathering" is even more plainly untenable. Section

202.5 is in fact essentially similar to the measures struck down in *Marion County*, *Nebraska* and *Jindal*: all would punish registrants who "access" forbidden websites, without regard to whether they do so in order to "gather information" or (as petitioner did) express themselves. But in any event, this Court has long held that gathering information is *itself* fully protected under the Free Speech Clause. Thus, *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653 (2011), rejected Vermont's plea to spare its statute on the ground that the law "regulate[d] not speech but simply access to information." *Id.* at 2665-2666. In rebuffing that defense, the Court reaffirmed what *Stanley* v. *Georgia*, 394 U.S. 557 (1969), described as "well established" decades ago: that the First Amendment protects the "right to receive information." *Id.* at 564.

The North Carolina Supreme Court's principal rationale, that Section 202.5 should be viewed as less suspect because it is directed at a precursor to First Amendment activity—*i.e.*, "access"—see Pet. App. 9a ("Section 202.5 only incidentally 'burdens the ability * * * to engage in speech *after accessing* those Web sites that fall within the statute's reach"), breaks even more seriously from the rules this Court's decisions establish. As the Court has repeatedly noted, *every* activity protected under the Free Speech Clause is effectuated through or preceded by "conduct" of some sort. But a law prohibiting newspapers "from purchasing or using ink" is constitutionally indistinguishable from one restricting their publication, *Sorrell*, 131 S. Ct. at 2667 (rejecting State's "conduct regulation" argument on this basis); accord *Minneapolis Star & Tribune Co.* v. *Minnesota Com'r of Rev.*, 460 U.S. 575, 582 (1983). And a law

prohibiting a class of people from reading certain newspapers would not be more constitutionally tolerable if the legislature made the "trigger" for criminal punishment the physical act of picking up—"accessing"—the paper.

In fact, neither the State nor the decision below seriously suggested that what Section 202.5 prohibits—"access[ing]" a prohibited website by someone on the registry—is *in itself* harmful. On the contrary, although the majority opinion identified activities other than "communication" that implicate the Legislature's protective purpose and can occur on the proscribed sites—*e.g.*, "lurking" and "harvest[ing] information" for illicit purposes, Pet. App. 13a—petitioner's Facebook post expressing delight at beating a traffic ticket is the first item on an inexhaustible list of instances where "access" neither inflicts nor leads to harm of any sort. This Court has held repeatedly that a categorical prohibition like Section 202.5 may be sustained under the First Amendment only "if *each activity* within the proscription's scope is [itself] an appropriately targeted evil," *Frisby* v. *Schultz*, 487 U.S. 474, 486 (1988)—and not when, as here, "the substantive evil" is "merely a possible byproduct of the activity." *Ibid.* (quoting *Los Angeles City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The State Supreme Court's decision viewed the fact that Section 202.5 prevents much expression that the government would have no interest in suppressing as indicative of its constitutionally benign character. See Pet. App. 10a-11a (concluding that Section 202.5 is "content neutral" because it prohibits all, rather than some, speech on the

websites). But that logic inverts constitutional first principles: As *Near* v. *Minnesota* teaches, prohibiting *all* expression in order to prevent a harmful subset is not a regulatory approach that the First Amendment encourages. See 283 U.S. at 722.

B. The State Supreme Court's Version of "Heightened Scrutiny" Ignores the Basic Rules Laid Down in This Court's First Amendment Decisions

Even in situations where strict judicial scrutiny is not called for, this Court has held that measures restricting First Amendment activities may be enforced only if shown, *inter alia*, to be "narrowly tailored." *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 641 (1994). Accordingly, petitioner's Section 202.5 conviction could not stand unless North Carolina had "show[n]," *McCullen* v. *Coakley*, 134 S. Ct. Ct. 2518, 2539 (2014), (1) that its law "does not * * * burden substantially more [protected activity] than necessary," *Ward*, 491 U.S. at 799—an inquiry that entails examining measures "that could serve its interests just as well," while imposing no (or much fewer) speech burdens, *McCullen*, 134 S. Ct. at 2537; (2) that Section 202.5 "directly advances" a "substantial" governmental interest, *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *and* (3) "leave[s] open ample alternative channels." *Ward*, 491 U.S. at 791.[4]

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[4] It is hardly self-evident that Section 202.5—which plainly discriminates among speakers and may not qualify as "content-neutral" under the Court's precedents—should have been subject to anything less than "strict" review. See Pet. App. 30a (Hudson, J., dissenting). But that point need not be argued over because, as the dissent explained, Section 202.5 would fail any

The State Supreme Court recited the language of these decisions. But it then subjected North Carolina's law to a form of "scrutiny" that in fact *omitted* every requirement that this Court's heightened scrutiny precedents have held the First Amendment to impose. Rather than compare the amount of speech Section 202.5 prohibits to the quantum "necessary" to advance the government's objective—or consider whether North Carolina "could achieve its interests [through means that] restrict[] less speech," *Thompson*, 535 U.S. at 372—the State Supreme Court pronounced the law narrowly tailored because it sweeps less broadly *than it might have, i.e.*, not imposing "a blanket prohibition against [registrants'] Internet use," Pet. App. 15a. Indeed, it was only by resort to this upside-down conception of "tailoring"—a "test" that could validate *any* law abridging speech—that the State Supreme Court was able to overlook Section 202.5's glaring defects and pronounce the law constitutional "in all respects." Pet. App. 2a.

1. Even if Section 202.5 applied only to true "social networking" websites such as Facebook, it would be a criminal prohibition of truly "alarming breadth," *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). The activities that were of concern to the Legislature—"harvesting information" about and communicating with minors for nefarious purposes—indisputably "comprise[] a minuscule subset" of "the universe of social network activity," *Marion County*,

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possibly applicable test. See *ibid.* Even a truly "incidental burden" is impermissible if it is not "essential to the furtherance of [the government's important] interest." *O'Brien*, 391 U.S. at 377.

705 F.3d at 699, that Section 202.5 punishes—a "universe" that includes artistic, religious, and political expression, gathering information from government sources, and communication with the other adults. See Ryan Neal, *Facebook Gets Older*, International Bus. Times, Jan. 16, 2014, available at http://goo.gl/U38JpJ (reporting that 170 million of 180 million U.S. Facebook users are 18 or older). See *Reno*, 521 U.S. at 876 (holding that "the governmental interest in protecting children * * * [can]not justify an unnecessarily broad suppression of speech addressed to adults.").

As the dissent highlighted, the law's sweep is still more vast. See Pet. App. 31a-34a. The statute's loosely-drafted definition threatens punishment for accessing sites, such as nytimes.com, that are far removed from the feared "social network" prowling scenario; and the law restricts the rights of registrants whose triggering offense was nonsexual or involved an adult victim (as well as the many others who pose no significant risk of engaging in the particular behavior with which Section 202.5 is concerned), see *id.* 32a; p. 3, *supra*.[5]

2. The court likewise failed even to consider more focused measures the State could take (and has taken) to address the behavior Section 202.5 aims to prevent and deter, let alone require that the State

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[5] The opinion below disputed certain examples offered in petitioner's brief and the dissent, but it *did not* deny that Section 202.5 authorizes prosecution for visiting the New York Times website, and the opinion pointedly declined to resolve acknowledged statutory ambiguities. Pet. App. 18a ("leav[ing] for another day what the "know[ledge]" element requires); *id.* 16a (stating that websites with certain characteristics would "not *necessarily* violate the statute") (emphasis added).

"demonstrate that alternative measures * * * would fail to achieve [its] interests," *McCullen*, 134 S. Ct. at 2540. See *id.* ("that the chosen route is easier" is insufficient).

The ordinary way to prevent criminal conduct is to enact, enforce, and strengthen laws forbidding that behavior. See *McCullen*, 134 S. Ct. at 2537; *Schneider* v. *State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). See also *Riley*, 487 U.S. at 795 (emphasizing, in striking down speech restriction claimed to prevent deception, States' unquestioned power to prosecute fraud). And nothing confines a State to punishing completed misconduct. North Carolina has enacted laws criminalizing "solicitation of [a] child by computer" and "cyberstalking," N.C. Gen. Stat. §§ 14-202.3, 14-196.3; and, to the extent these would not reach the sorts of internet activities the State insisted Section 202.5 prevents (*e.g.*, "lurking" or "gathering information" about minors for criminal purposes), the Legislature could enact a law criminalizing those activities. Or it could revive the provision not enacted in 2008 requiring increased parental oversight of minors' account settings and interactions on these websites. See p. 3, *supra*; *Reno*, 521 U.S. at 877 (invalidating statute, highlighting parents' ability to prevent their children's exposure to inappropriate internet material).

Moreover, for individual registrants incapable of conforming their behavior to the law, see N.C. Gen. Stat. § 14-208.6; *Kansas* v. *Crane*, 534 U.S. 407, 410 (2002), the State presumably could impose focused, more restrictive measures, perhaps prohibiting them

from interacting with (or visiting pages created by) users under age 18—or giving them the option of submitting to special surveillance. Cf. Ind. Code § 11-8-8-8 (requiring that paroled sex offenders who use "internet identifiers" submit to searches of devices).

Indeed, the nature of the problem Section 202.5 addresses affords options absent in other settings. In (unsuccessfully) defending the statute in *Stevens*, the Government argued that the difficulty of identifying persons perpetrating the cruel acts captured on film made prosecuting distributors the "only effective way" of combatting abuse, see 559 U.S. at 492 (Alito, J., dissenting). But here, users' own computers (and website operators' servers) provide detailed and precise information about their online activities and interactions.

3. Nor did the North Carolina Supreme Court seriously address whether this law "direct[ly] and materia[lly]" advances an important State interest. in a direct and material way. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 478 (1995). Section 202.5's design is extraordinarily *in*direct: the law denies access to a broad range of websites to a large class of people to make it more difficult for a tiny subset who *might* gather information that *might* lead to communication with minors that *might* be a precursor to harmful behavior. Whether the law advances North Carolina's undeniably vital interest—protecting minors from internet-enabled predation—"materially" is also doubtful. That interest applies equally to *any* person who would access the internet in order to identify minors for criminal purposes. Yet North Carolina has passed no general criminal law prohibiting that behavior, and Section 202.5 targets

only those on the State's registry (and *all* registrants—regardless of individual circumstances), notwithstanding the reality that persons with no prior sex offense convictions commit the overwhelming majority of such crimes.[6] And the Legislature chose not to enact the proposed provision that would have strengthened parental involvement—but entailed obligations for website operators, whose concerns presumably receive a more careful hearing than do registrants'. See *Greater New Orleans Broad. Ass'n, Inc.* v. *United States.*, 527 U.S. 173, 189-190 (1999) (holding that statute prohibiting airing of advertising for privately-owned casinos failed to advance asserted interest in "alleviating the social costs of casino gambling by limiting demand," when Congress simultaneously encouraged *tribal* casino gambling). And while the Section 202.5(c) exceptions do not, as the decision insisted, mitigate its unconstitutionality, they likely *do* detract from the objectives claimed: The State has never explained, for

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[6] Although any recidivism by a person convicted of a serious crime is a rightful and important governmental concern, empirical evidence refutes widely-held assumptions about dangers posed by registrants. A comprehensive Justice Department study found that recidivism rates for sexual offenders are significantly *lower* than for persons convicted of other crimes, see Patrick A. Langan et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994*, at 14 (2003), and that persons previously incarcerated for *non*sexual offenses accounted for six times more *sex* crimes than those whose prior conviction was for a sexual offense. *Id.* at 24. Public discussions also often fail to distinguish between the comparatively small subset of registrants who at some point re-offend (including by violating a parole condition) and the truly tiny subpopulation who suffer from "personality disorder[s]" that render them incapable of controlling predatory impulses. See *Kansas* v. *Hendricks*, 521 U.S. 346, 358 (1997).

example, why a person intent on "harvesting information" about minors could not "lurk" in a single-purpose "chat room" site. Cf. Pet. App. 15a (describing such sites as "exclusively devoted to speech").

4. The North Carolina Supreme Court's "scrutiny" of Section 202.5 concluded by contorting the requirement that a law regulating speech leave open "ample" "alternative channels" for the protected activity. *Ward*, 491 U.S. at 791. Reprising the "glass half-full" approach, the court held this requirement met because the internet offers "myriad sites that do not run afoul of the statute," Pet. App. 18a, noting, for example, that registrants may lawfully "follow current events on WRAL.com," even if it is a felony for them to "access" nytimes.com, *id.* 17a, and that other "methods of communication[,]" including "traditional mail[] and phone calls, * * * are unrestricted," *id.* 18a. But this Court's cases instruct that the First Amendment does not allow "the exercise of [a person's] liberty of expression in appropriate places [to be] abridged on the plea that it may be exercised in some other place"—any more than it permits "a statute ban[ning] leaflets on certain subjects as long as individuals are free to publish books," *Reno*, 521 U.S. at 880 (quoting *Schneider*, 308 U.S. at 163). The decision's own example largely refutes its conclusion: people visit the New York Times website not merely to "follow current events," but also to read its opinion and editorial pages and proprietary content, search its archives, and engage with others across the Nation in robust comment sections. See also Google, *Official Blog*, Dec. 16, 2015, available at https://goo.gl/ALvJdU (announcing that upcoming

presidential debate would feature "questions from the YouTube community").

As for true social networking websites, it is essentially definitional that equivalent "alternatives" will not exist: the ideas and information exchanged derive from interactions among the networked users involved. The burdens Section 202.5 imposes, moreover, are cumulative: registrants are indisputably prohibited from two of the top five U.S. websites and arguably from all five, see Alexa, "Top Sites in the United States," www.alexa.com/topsites/countries/us, which account for billions of users far beyond North Carolina's borders. See Facebook Newsroom, "Company Info," available at newsroom.fb.com/company-info/ (Facebook has 1.59 billion monthly users, 84% residing outside U.S. and Canada).[7] And registrants

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[7] In the court below, the State pointed to a "statement of rights and responsibilities" on the Facebook website that it argued did not allow petitioner (and other registrants) to maintain accounts. That web page—which was not part of the case record—has nothing to do with the constitutionality of North Carolina's law. Section 202.5 indisputably applies to sites that *would* otherwise welcome registrants, thereby criminalizing protected speech on private property that the owner *invites*. See *Sorrell*, 131 S. Ct. at 2665 (highlighting significance of fact that statute "imposed a restriction on access to information in private hands"). And even if the cited language created a contractual obligation, neither Section 202.5 nor any other North Carolina law imposes *criminal* punishment for violating private agreements with website operators. (Nor could they: Facebook also bars users from posting material that is "sensational," or "disrespectful," or "show[s] excessive amounts of skin." See "Advertising Policies," www.facebook.com/policies/ads/#prohibitedcontent). Finally, the cited language does not purport to prevent anyone from viewing pages (*i.e.* "gathering information") on the Facebook

must also invest great effort, on pain of criminal prosecution, determining which sites fall on which side of the hazy line separating constitutionally-protected from felonious "access." See *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (when threat of liability induces persons "to abstain from protected speech," they "harm[] not only themselves but society as a whole.").[8]

5. Finally, though the facial invalidity of Section 202.5 is established without resort to the "strong medicine" of First Amendment overbreadth doctrine, see Pet. App. 24a (quoting *New York* v. *Ferber*, 458 U.S. 747, 769 (1982)), the decision below misunderstood controlling precedent on that point also. This case is the antithesis of one where a person whose conduct falls within a law's "plainly legitimate sweep" is nonetheless entitled to relief, on account of the relative "number of [the law's *other*] applications [that] are unconstitutional," *Stevens*, 559 U.S. at 473 (internal citation omitted). Section 202.5 has *no* "legitimate sweep": Though the State presumably *could* enact a prohibition on using—or "accessing"—a networking website for predatory purposes, it has not done so. And if such a law were in force, petitioner,

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site—only from registering an "account." See Facebook, "Terms of Service," www.facebook.com/legal/terms.

[8] The decision below concluded—consistently with this Court's precedent—that petitioner, whose conviction involved accessing Facebook, could not raise a free-standing vagueness challenge based on the statute's enigmatic "social networking website" definition, Pet. App. 27a. But determining his facial challenge entails evaluating the adequacy of "alternative channels," and it is relevant to *that* inquiry that persons subject to Section 202.5 lack notice as to *which* potential alternatives are permissible.

whom no one has alleged improperly sought or "harvested" information when he accessed Facebook.com in 2010, would be outside its ambit. The only support the decision offered for concluding that Section 202.5 goes no more than "marginal[ly]" beyond a "plainly legitimate" core was the opinion's earlier "detailed * * * analysis" of "tailoring," Pet. App. 25a—which, in fact, contains *no* analysis of how much protected activity Section 202.5 sweeps in, highlighting instead how much protected activity the law leaves unpunished. See p. 19, *supra*.[9]

II. The State Supreme Court's Decision Also Conflicts With Decisions of Numerous Lower Courts

Unsurprisingly, given its departures from bedrock principles, the decision below conflicts with those of several federal courts of appeals and is in stark tension with numerous others. In fact, other courts have overturned measures imposing *far less* onerous and sweeping burdens upon internet activities of individuals entitled to *less* robust constitutional protections (*e.g.*, those still subject to supervised release). This stark divergence in the extent of First

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[9] Although this facial challenge should succeed without resort to the overbreadth doctrine's special rules, petitioner presented an overbreadth challenge in all three courts below, and those rules might have relevance in disposing of arguments arising from unusual applications, such as to registrants who are currently incarcerated, who generally do not enjoy the full measure of constitutional protection, see *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), but likely do not have internet access, either.

Amendment protection available from State to State is itself reason for this Court's intervention.

1. Courts of appeals have held, in square conflict with the conclusion below that Section 202.5 should be analyzed as "conduct" regulation, that laws regulating registrants' internet activities "directly and exclusively burden speech." *Harris*, 772 F.3d at 573. Accord *Marion County*, 705 F.3d at 697 (Indiana law banning registrants from accessing "social networking" websites "preclude[d] expression through the medium of social media, [and] also limit[ed their] right to receive information and ideas.") (internal citations omitted). And in *Doe* v. *City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012), the Tenth Circuit had no difficulty seeing that an ordinance banning registrants from public libraries merited scrutiny as a direct regulation, rather than one addressing the "conduct" of entering ("accessing") the library. Indeed, the constitutional right vindicated in that case, "the First Amendment * * * right to receive information," *id.* at 1120, is the very one the decision below treated as unprotected "conduct."

2. The division over basic First Amendment principles is made especially apparent by contrasting the State Supreme Court's decision with the Seventh Circuit's in *Marion County*, which considered—and rejected on First Amendment grounds—a similar "social networking" website ban, applicable to a similar subset of individuals. The Seventh Circuit concluded, in terms that could—and should—have been applied to Section 202.5, that Indiana's law was not narrowly tailored, because the activity the State sought to prevent, internet communications between

predators and minors, "comprise[d] a minuscule subset of the universe of social network activity." 705 F.3d at 699. Indiana's important crime prevention goals, the Seventh Circuit recognized, did "not license the state to restrict far more speech than necessary to target the prospective harm." *Id.* at 701. See also *Doe* v. *Jindal*, 853 F. Supp. 2d at 605 (holding that statute was not "crafted precisely or narrowly enough—as is required by constitutional standards—to limit the conduct it seeks to proscribe").

The majority opinion below, straining to deny a conflict, reasoned that Section 202.5 is somewhat less sweeping than was Indiana's law and that the Seventh Circuit did not squarely address the "gathering information" rationale advanced in this litigation for Section 202.5. But these efforts are unavailing. The precise contours of the statute did not figure in the *Marion County* decision's First Amendment analysis, which focused on the vast amount of protected activity unnecessarily burdened. (In fact, the Indiana law, like North Carolina's, exempted "electronic mail program[s and] message board[s]," though not "chat rooms," and it only applied to certain registrants. See 705 F.3d at 695-696 & n.1.). And while the Seventh Circuit noted that an alternative justification might be ventured in the future, the court observed that it too might "burden[] a 'substantially broader' than necessary group * * * who will not use the Internet in illicit ways." *Id.* at 701 (citing *Ward*, 491 U.S. at 800).[10]

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[10] In the wake of the Seventh Circuit's decision, Indiana amended its law to provide punishment only for those who violate a *specific term of supervised release* that "prohibits the offender from using a social networking web site * * * to

3. The extent of the North Carolina Supreme Court's deviation is further apparent from appellate decisions addressing (and, with one exception, invalidating) measures requiring registrants to provide their "internet identifiers" to the government. See *Doe* v. *Harris*, 772 F.3d 563; *White* v. *Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); see also *Doe* v. *Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015) (invalidating law on vagueness grounds), No. 15-36 (6th Cir. argued Jan. 27, 2016); but see *Doe* v. *Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding a narrower version of such a statute). These laws impose a far less onerous burden than does Section 202.5: They do not purport to prohibit registrants from "accessing" any *site* on the internet, including "social networking" ones, and the laws *allow* registrants to communicate and express themselves pseudonymously, so long as law enforcement is told of their identity. Yet these measures have been held incompatible with the First Amendment, based on their potential to chill the registrants' constitutionally-protected right to speak anonymously. No court that has invalidated such a law, as incompatible with the principle that persons previously convicted but no longer under criminal justice supervision enjoy full First Amendment rights, could possibly approve Section 202.5's sweeping criminal prohibition.[11]

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communicate * * * with a [minor]." Ind. P.L. 247-2013 § 8, codified at Ind. Code § 35-42-4-12 (2014) (emphasis added).

[11] The Tenth Circuit in *Shurtleff* upheld a law the Utah Legislature had amended in response to a district court decision declaring it unconstitutional, 628 F.3d at 1221, and only after

4. The North Carolina Supreme Court's decision is similarly irreconcilable with decisions of numerous federal courts that have rejected as overly burdensome *supervised release conditions* that restrict internet use by those convicted of sex offenses. Such conditions are imposed (1) on persons who—unlike petitioner—are *not* entitled to the full constitutional liberties, see *Samson* v. *California*, 547 U.S. 843, 857 (2006); (2) on an individualized basis, after notice and opportunity to be heard, and (3) for a limited duration, in the immediate aftermath of release from prison. But they nonetheless have been subject to far more serious scrutiny, under what is essentially a "rational basis" standard, than Section 202.5 received from the North Carolina Supreme Court. See 18 U.S.C. § 3583 (requiring conditions be "reasonably related" to, *inter alia*, "the nature and circumstances of the offense" and "the defendant's history and characteristics," and impose "no greater deprivation of liberty than is reasonably necessary").

As the Third Circuit explained in a case overturning a condition imposed on a person convicted of a sex offense, "[w]hen a ban restricts access to material protected by the First Amendment, courts must balance the [§ 3583] considerations against the serious First Amendment concerns endemic in such a restriction." *United States* v. *Thielemann*, 575 F.3d 265, 272-273 (3d Cir. 2009) (internal quotation marks omitted). In *United States* v. *Perraza-Mercado*, 553 F.3d 65 (1st Cir. 2009), the court held that a condition prohibiting the defendant, convicted of knowingly engaging in sexual conduct

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giving the amended version a narrowing construction, *id.* at 1223-1224, to avoid constitutional difficulty.

with a female under the age of twelve, from accessing the internet in his home for fifteen years, amounted to "a greater deprivation of his liberty than [was] reasonably necessary for his rehabilitation." *Id.* at 68-69. The Second Circuit in *United States* v. *Sofsky*, 287 F.3d 122 (2d Cir. 2002), overturned for similar reasons a condition prohibiting the defendant, convicted of receiving child pornography, from accessing a computer, the internet, or a bulletin board system without his probation officer's approval during his three-year supervised release term.

To be sure, several of the invalidated restrictions applied even more broadly than does Section 202.5. But it bears emphasis that most were temporary in duration and imposed on individuals who had committed offenses involving use of the internet. And none *categorically* forbade accessing any website—instead requiring that the defendant either refrain *or* obtain approval, and there is no reason for assuming that permission would have been withheld for a "post" expressing gratitude for a favorable traffic court outcome.

III. This Case Warrants The Court's Intervention

The statute under which petitioner was convicted is significant not only for the extent of its departure from core First Amendment principles but also for its grave and far-reaching real-world consequences. Section 202.5 is no quaint holdover. The law, which regulates more than 21,000 persons, was enacted, unanimously, within the past decade, and it has been enforced through more than 1,000 criminal

prosecutions.[12] Cf. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting) (questioning need to invalidate law that "as a practical matter [was] obviously unenforceable").

Absent this Court's intervention, law-abiding individuals singled out under Section 202.5 will continue to face criminal jeopardy for activities—including expression, association, communication, and receiving information—that not only are at the core of the First Amendment's Free Speech guarantee but that are increasingly central to participation in the Nation's economic, cultural, religious, and political life. See *United States* v. *Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) (describing internet access as "virtually indispensable in the modern world of communications and information gathering.").

The burdens the statute imposes radiate beyond the individuals directly threatened with punishment, abridging the rights of registrants' family members, friends and others sharing their recreational interests, political and religious views, and artistic sensibilities who want to associate and communicate with them. See *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (affirming that First Amendment "protect[s] the right of the speaker" and the "right of the listener to receive the information sought to be

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[12] See *Offender Statistics*, *supra* n.1; John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek, (May 29, 2013) (reporting that 1,136 charges under Section 202.5 between 2009 and 2012). Nationwide, there are nearly 850,000 persons on similar registries. U.S. Dep't of Justice, *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* at 4 n.24 (Dec. 2015).

communicated").

That those burdens are imposed on the class of persons who, by virtue of a prior conviction, are "registered in accordance with Article 27A of Chapter 14 of [North Carolina's] General Statutes," N.C. Gen. Stat. § 14-202.5(a), does not alleviate, but instead heightens, cause for First Amendment concern. More than eight decades ago, the Court settled that Free Speech rights are not "lost" on account of "[past] derelictions," *Near*, 283 U.S. at 720. And although the protections of the First Amendment do not depend on the "value" of communication suppressed—cat videos, political commentary, and celebrations of traffic court victories enjoy equal status, see *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981)—people with prior criminal convictions have important things to communicate. See *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (striking down "Son of Sam" statute, identifying historically significant works that "depict[ed] the [author's] crime").

This Court's First Amendment cases have long condemned "regulations that discriminate based on * * * the identity of the speaker," *Los Angeles Police Dep't* v. *United Reporting Pub. Corp.*, 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting), or burden "a narrow class of disfavored speakers," *Sorrell*, 131 S. Ct. at 2668. See also *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340 (2010); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 232 (1987). Such selective abridgments arouse heightened concern because of the danger that "the democratic majority" will enact restrictions of a politically marginalized minority that they would

never "accept for themselves." *Cruzan* v. *Dir., Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). Indeed, landmark First Amendment decisions attest to a special role for this Court in safeguarding from State incursion the Free Speech rights of those who are misunderstood or vilified. See, *e.g.*, *West Virginia* v. *Barnette*, 319 U.S. 624 (1943); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

This case calls for such intervention. The dynamic that led members of the North Carolina General Assembly—unanimously—to enact Section 202.5 is one that continues to be replayed in legislatures across the Nation. The "acorn[s]" sown in the early 2000s, when this Court upheld straightforward registration and notification requirements, have yielded not a lone "mighty oak," *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting), but a dense thicket of restrictive laws whose undeniable effect and only evident purpose is to make more difficult the lives of persons on sex offender registries. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1073 (2011-2012) (explaining that measures have "spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary").

"A State cannot * * * deem a class of persons a stranger to its laws." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Nor may a State (or a state court) deem a class of persons a stranger to the protections of the First Amendment. When the government "deprives

the disadvantaged person or class of the right to use speech," it deprives them of their ability "to establish worth, standing, and respect." *Citizens United*, 558 U.S. at 340-341. This Court's review is needed to ensure that state legislatures and state courts, bound to uphold the federal Constitution, act in accordance with those precepts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2016

Appendix

IN THE SUPREME COURT
OF NORTH CAROLINA
No. 366PA13

FILED: 6 NOVEMBER 2015

STATE OF NORTH CAROLINA

v.

LESTER GERARD PACKINGHAM

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, __ N.C.App. __, 748 S.E.2d 146 (2013), vacating a judgment entered on 30 May 2012 by Judge William Osmond Smith in Superior Court, Durham County. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, Attorney General, by Anne M. Middleton and David L. Elliott, Assistant Attorneys General, for the State-appellant.

Glenn Gerding, Appellate Defender,[1] *for defendant-appellee.*

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[1] Glenn Gerding was appointed to the position of Appellate Defender on 1 November 2015. His motion to withdraw as private assigned counsel was allowed by this Court on 5 November 2015. His motion to represent defendant through this Court's appointment of the Appellate Defender was also allowed on 5 November 2015.

EDMUNDS, Justice.

The Court of Appeals vacated defendant's conviction for accessing a social networking Web site as a registered sex offender, finding that the applicable statute, N.C.G.S. § 14-202.5, is unconstitutional both on its face and as applied to defendant. We conclude that the statute is constitutional in all respects. Accordingly, we reverse the holding to the contrary of the Court of Appeals.

In 2008, the General Assembly enacted N.C.G.S. § 14-202.5, which bans the use of commercial social networking Web sites by registered sex offenders. In April 2010, Officer Brian Schnee of the Durham Police Department began an investigation to detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites. Officer Schnee identified defendant Lester Gerard Packingham (defendant), who had been convicted in 2002 of a sexual offense in Cabarrus County, North Carolina, as a registered sex offender subject to N.C.G.S. § 14-202.5. Officer Schnee located defendant's name and photograph on the North Carolina Department of Justice Sex Offender Registry. While investigating the Web site Facebook.com, Officer Schnee found a user profile page that, based upon the profile photo, he believed belonged to defendant. Although the name on the Facebook account was "J.R. Gerrard," Officer Schnee was able to confirm that the Facebook page in fact was defendant's. During a subsequent search of defendant's residence, officers recovered a notice of "Changes to North Carolina Sex Offender Registration Laws" signed by defendant describing commercial

social networking Web sites that he was prohibited from accessing. This document was admitted into evidence at trial.

On 20 September 2010, defendant was indicted by a Durham County grand jury for violating N.C.G.S. § 14-202.5. On 9 December 2010, defendant filed a motion to dismiss the charge in Superior Court, Durham County, contending that section 14-202.5 is unconstitutional on its face or as applied to him. On 19 April 2011, the trial court entered an order denying defendant's motion. The trial court's order included a finding of fact that both the State and defendant agreed that Facebook.com is a social networking Web site as contemplated by N.C.G.S. § 14-202.5. The trial court declined to address defendant's facial challenge but found that N.C.G.S. § 14–202.5 was constitutional as applied to defendant. On 22 June 2011, the Court of Appeals denied defendant's petition for certiorari.

The case went to trial and, after considering evidence that defendant maintained a Facebook page, a jury on 30 May 2012 found defendant guilty of one count of accessing a commercial social networking Web site by a registered sex offender. The trial court sentenced defendant to a term of six to eight months of imprisonment, suspended for twelve months, and defendant was placed on supervised probation.

Defendant appealed to the Court of Appeals, challenging the constitutionality of N.C.G.S. § 14-202.5. That court determined that N.C.G.S. § 14-202.5 "plainly involves defendant's First Amendment rights . . . because it bans the freedom of speech and association via social media" and concluded that intermediate scrutiny was appropriate. *State v.*

Packingham, __ N.C. App. __, __, 748 S.E.2d 146, 150 (2013). While acknowledging the legitimate state interest in protecting children from sex offenders, the Court of Appeals found that the statute "is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify" because it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id.* at __, 748 S.E.2d at 154. The court further concluded that the language of N.C.G.S. § 14-202.5 "lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited." *Id.* at __, 748 S.E.2d at 153. Accordingly, finding that the statute violates the First Amendment, the Court of Appeals held the statute unconstitutional on its face and as applied, and vacated defendant's conviction. *Id.* at __, 748 S.E.2d at 154. On 7 November 2013, this Court allowed the State's Petition for Discretionary Review.

Statutes are presumed constitutional, *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the interpretation of a statute is controlled by the intent of the legislature, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975). We review challenges to the constitutionality of a statute de novo. *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citing *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011)).

Defendant argues that N.C.G.S. § 14-202.5 is unconstitutional both on its face and as applied to him, contending that the statute violates his right to free speech as guaranteed by the United States and North

Carolina Constitutions. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); N.C. Const. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ."). As we begin our analysis, we note that while these constitutional provisions appear absolute, "[h]istory, necessity, and judicial precedent have proven otherwise: 'Freedom of speech is not an unlimited, unqualified right.' " *Hest Techs., Inc. v. State ex rel. Perdue,* 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) (quoting *State v. Leigh,* 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971)), *cert. denied,* __ U.S. __, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013). In addition, when analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court. *See State v. Petersilie,* 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting that Court's First Amendment jurisprudence "[i]n this case").

The issue before us is whether the proscription of access to some social networking Web sites violates the First Amendment. An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. *Frye v. City of Kannapolis,* 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. *Id.* The constitutional standards used to decide either challenge are the same. *Edwards v. District of Columbia,* 755 F.3d 996, 1001 (D.C. Cir. 2014).

We begin by considering defendant's facial challenge, cognizant that a facial attack on a statute imposes a demanding burden on the challenger. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). This Court rarely upholds facial challenges because "[t]he fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson,* 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno,* 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707).

The First Amendment is triggered by regulations that burden speech, so we must make an initial determination whether N.C.G.S. § 14-202.5 is a regulation of speech or a regulation of conduct. The distinction is critical because a statute that regulates speech is "subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson v. Freeman,* 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d 5, 14 (1992) (plurality) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794, 804 (1983)). First Amendment protection of speech is extended to conduct only when the conduct in question "is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.,* 547 U.S. 47, 66, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156, 175 (2006). In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech "must be evaluated in terms of [its] general effect." *United States v. Albertini,* 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536, 548

(1985). An incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

The statute at issue provides in pertinent part:

(a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (2013).

This statute addresses the ability of registered sex offenders to access some social networking Web sites. We concluded in *Hest* that legislation banning the operation of sweepstake systems primarily regulated "noncommunicative conduct rather than protected speech." 366 N.C. at 296, 749 S.E.2d at 435. The plaintiff in *Hest* argued that video games which were

used to announce the results of the sweepstakes should be protected by the First Amendment. We disagreed, finding that the statute at issue in that case prohibited not the video games but the underlying conduct of a sweepstakes whose outcome was announced through the video game. *Id.* at 297, 749 S.E.2d at 435. Unlike the statute in *Hest,* however, the statute here defines a "commercial social networking Web site" as one that facilitates social introduction between people, N.C.G.S. § 14-202.5(b)(2), and provides users with a means of communicating with each other, *id.* § 14-202.5(b)(4). As is apparent to any who access them, social networking Web sites provide both a forum for gathering information and a means of communication. Even so, like the statute in *Hest,* the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach. Thus we conclude that section 14-202.5 is a regulation of conduct.

Our next inquiry is whether N.C.G.S. § 14-202.5 governs conduct on the basis of the content of speech or is instead a content-neutral regulation. *See Brown v. Town of Cary,* 706 F.3d 294, 300 (4th Cir. 2013) ("Our first task is to determine whether the [statute] 'is content based or content neutral . . . .' ") (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36, 50 (1994) (O'Connor, J., concurring)). The level of scrutiny we apply is based on this determination. Restrictions based upon the content of the speech trigger strict scrutiny, *see United*

States v. Playboy Entm't Grp., 529 U.S. 803, 814, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865, 880 (2000), and are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). To survive under strict scrutiny, the regulation "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, __ U.S. __, __, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502, 515 (2014) (citation omitted). In contrast, content-neutral regulations of conduct that impose an incidental burden on speech are subject to intermediate scrutiny because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497, 517 (1994).

The United States Supreme Court recently discussed the distinction between content-based and content-neutral regulations in *Reed v. Town of Gilbert*, __ U.S. __, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Under *Reed*, a court initially must consider "whether the law is content neutral on its face." *Id.* at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 246. Although *Reed* focused on the interpretation of content-based regulations of *speech*, while we concluded above that section 14-202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14-202.5 is a content-neutral regulation. On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are

available for use by minors. Thus, we conclude, as the Court did in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989), that section 14-202.5 "involve[s] a facially content-*neutral* ban on the use [of commercial social networking Web sites]." *Reed*, __ U.S. at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247 (citing *Ward*, 491 U.S. at 792, 109 S. Ct. at 2754, 105 L. Ed. 2d at 676).

As to the intent of the General Assembly in passing section 14-202.5, the trial court found as a matter of law that the purpose of the statute is to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes." The parties have not challenged this conclusion of law. *Reed* states that a law, though content neutral on its face, is "considered [a] content-based regulation[] of speech" if the law "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at __, 135 S. Ct. at 2227, 192 L. Ed. 2d at 245 (fourth alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675). A court must address both prongs before concluding that a lower level of scrutiny applies to the law. *Id.* at __, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247. Assuming that these tests also apply to a regulation of conduct, we see that section 14-202.5 satisfies both. The justification of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor does the statute have anything to say regarding the content of any speech on a regulated site. As a result, we conclude that, to the

extent *Reed* applies to our analysis of section 14-202.5, the statute satisfies that case's requirements and strict scrutiny is not required. Although the statute may impose an incidental burden on the ability of registered sex offenders to engage in speech on the Internet, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675 (citation omitted). Accordingly, we conclude that N.C.G.S. § 14-202.5 is a content-neutral regulation requiring intermediate scrutiny.

"Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted). The Supreme Court has provided guidance in applying intermediate scrutiny. In *United States v. O'Brien*, the defendant claimed that the statute forbidding destruction of his Selective Service registration card was unconstitutional as applied to him because such a ban on burning the card violated his right to free speech. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The Supreme Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," *id.* at 376, 88 S. Ct. at 1678, 20 L. Ed. 2d at 679, the regulation

> is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it

> furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,

id. at 377, 88 S. Ct. at 1679, 20 L. Ed.2 d at 680. Because the statute at issue here is a content-neutral regulation that imposes only an incidental burden on speech, we believe the four-factor test from *O'Brien* is instructive in evaluating defendant's facial attack on N.C.G.S. § 14-202.5.

Looking to the first two *O'Brien* factors, the parties agree that promulgating restrictions such as those contained in N.C.G.S. § 14-202.5 on registered sex offenders is within the constitutional power of the General Assembly and that protecting children from sexual abuse is a substantial governmental interest. We then consider *O'Brien* 's third factor, whether this governmental interest is related to the suppression of free expression. The State asserts that the statute was enacted to prevent registered sex offenders from prowling on social media and gathering information about potential child targets. Viewing this statute as a preventive measure apparently intended to forestall illicit lurking and contact, we see that it is distinguishable from other North Carolina statutes that criminalize communications which have already occurred. The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression

of free speech. Accordingly, the statute satisfies *O'Brien*'s third factor.

Although the fourth *O'Brien* factor appears to reflect the strict scrutiny requirement that the regulation be the "least restrictive means" of carrying out a compelling state interest, *McCullen*, __ U.S. at __, 134 S. Ct. at 2530, 189 L. Ed. 2d at 515, the United States Supreme Court has since explained that for content-neutral regulations, the statute should be "narrowly tailored to serve a significant governmental interest," *Ward*, 491 U.S. at 796, 109 S. Ct. at 2756, 105 L. Ed. 2d at 678 (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984)) (finding that a narrowly tailored regulation controlling noise does not restrict free speech). Narrow tailoring requires the government to demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, __ U.S. at __, 134 S. Ct. at 2540, 189 L. Ed. 2d at 526.

Defendant argues that the statute is not narrowly tailored. Specifically, defendant contends that the statute's definition of a "commercial social networking Web site" is overbroad, that the statute does not take into account the underlying offense of conviction or the likelihood of recidivism, that the statute does not require criminal intent, that the statute is underinclusive because, *inter alia*, it applies only to commercial Web sites, that less burdensome laws already exist to protect children from baleful Internet contacts, and that sufficient alternatives allowing communication do not exist. Defendant's arguments

are premised on the assumption that a statute regulating the manner of speech must be drawn as narrowly as possible, or at least more narrowly than this statute. However, the Supreme Court has stated explicitly that "[l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757-58, 105 L. Ed. 2d at 680. The Court went on to explain that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d at 681.

Instead of imposing a blanket prohibition against Internet use, the statute establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited. N.C.G.S. § 14-202.5(b). In addition, the statute entirely exempts Web sites that are exclusively devoted to speech, such as instant messaging services and chat rooms. *Id.* § 14-202.5(c). Thus we see that the General Assembly has carefully tailored the statute in such a way as to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors, thereby addressing the evil that the statute seeks to prevent. While we acknowledge that defendant has identified some areas in which the statute could have been drafted even

more narrowly, we conclude that the statute is sufficiently narrowly drawn to satisfy the requirements of *Ward*.

Our inquiry does not end here, however. A content-neutral statute not only must be narrowly tailored but must also "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753, 105 L. Ed. 2d at 675 (quoting *Cmty. for Creative Non–Violence*, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227). Subsection 14-202.5(c) allows such alternatives through specific exceptions for Web sites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. A Web site that requires one seeking access to provide no more than a username and an email address to reach the page does not necessarily violate the statute. Only a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited. In addition, even if a site falls within the definition of a "commercial social networking Web site" found in subsection 14-202.5(b), in order to convict a registered sex offender of accessing the site, the State must prove that "the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C.G.S. § 14-202.5(a).

In his brief and argument to this Court, defendant lists numerous well-known Web sites that he contends he could not access legally. In considering those and other similar sites, we find that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant

could access without violating N.C.G.S. § 14-202.5. For example, defendant would not violate N.C.G.S. § 14-202.5 by accessing the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques, because its Terms of Service require users to be at least eighteen years old to maintain a profile. *Paula Deen Network Terms of Service,* http://www.pauladeen.com/terms-of-service/ (last visited 5 November 2015) ("This website is designed for and targeted to Adults. It is intended solely and exclusively for those at least 18 years of age or older."). Similarly, users may follow current events on WRAL.com, which requires users to be at least eighteen years old to register with the site and, as a result, is not prohibited. *Capitol Broadcasting Company Terms of Use,* http://www.capitolbroadcasting.com/terms-of-use/ (last visited 5 November 2015) ("[Y]ou must be at least 18 years old to register and to use the Services."). A sex offender engaging in an on-line job search is free to use the commercial social networking Web site Glassdoor.com, which prohibits use by individuals under the age of eighteen. *Glassdoor Terms of Use,* http://www.glassdoor.com/about/terms.htm (last visited 5 November 2015) ("To access or use Glassdoor, you must be 18 years of age or older. . . ."). Finally, sex offenders permissibly may access Shutterfly to share photos, because that site limits its users to those eighteen and older. *Shutterfly Terms of Use,* http://shutterfly-inc.com/terms.html (last visited 5 November 2015) ("In order to create a member account with any of our Sites and Apps, you must be at least 18 years of age.").

While we leave for another day the question whether a site's terms of use alone are sufficient as a matter of law to impute knowledge of the site's limitations on access to a registrant, such terms of use provide specific and pertinent information to a registered sex offender seeking lawful access to the Internet. These examples demonstrate that the Web offers registered sex offenders myriad sites that do not run afoul of the statute. In addition, such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site, are unrestricted. Accordingly, the regulation leaves open ample channels of communication that registered sex offenders may freely access.

Defendant cites cases from other jurisdictions faulting similar statutes. However, those cases are not binding on this Court, and the statutes under consideration in those cases are readily distinguishable from our own. For instance, a federal circuit court found unconstitutional an Indiana statute that sought to prevent most sex offenders from communicating with minors by prohibiting their use of commercial social networking Web sites, including instant messaging services and chat rooms. *See Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 695–96 (7th Cir. 2013).The circuit court found that the law was not narrowly tailored to prevent illicit communications between sex offenders and minors. *Id.* at 695. Not only did the Indiana statute prohibit use of instant messaging and chat room services, both of which are exempted under N.C.G.S. § 14-202.5, Indiana's statute focused on preventing communications, while North Carolina's statute focuses on preventing registered sex offenders

from gathering information about minors on the Internet. Similarly, while a federal court concluded that Louisiana's statute, which was analogous to Indiana's, was facially unconstitutional because it was vague and overbroad, *Doe v. Jindal,* 853 F. Supp. 2d 596, 607 (M.D. La. 2012), Louisiana thereafter amended that statute to a version more in line with N.C.G.S. § 14-202.5, *see* La. Rev. Stat. Ann. 14:91.5 (2012), available at http://legis.la.gov/Legis/Law.aspx?d=78714.

Thus, we conclude that N.C.G.S. § 14-202.5 satisfies *O'Brien*'s four factors, is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Defendant has failed to meet the high bar necessary to mount a successful facial challenge. *See, e.g., Thompson,* 349 N.C. at 496, 508 S.E.2d at 285 (holding defendant's facial challenge to a statute regulating pretrial release failed when defendant did not establish that no set of circumstances existed under which the act would not be valid). Accordingly, we conclude the statute is constitutional on its face.

We next consider defendant's as-applied challenge. A statute that is constitutional on its face nevertheless may be unconstitutional as applied to a particular defendant. Because Facebook does not limit users to those over the age of eighteen and otherwise fits the definition of a commercial social networking Web site set out in N.C.G.S. § 14-202.5, defendant is forbidden to access that site unless the statute is unconstitutional as applied to him. Earlier in this opinion we observed that the trial court made the uncontested finding that the government's interest here is

protecting minors by preventing registered sex offenders from gathering information about them on social media. Although we also found that the statute is content-neutral, we observed that it imposes an incidental burden on speech on the Internet. We now consider whether this incidental restriction on defendant is no greater than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680.

Beginning with consideration of the nature and severity of the incidental restriction, we have stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18, 25 (1989)). The United States Fourth Circuit Court of Appeals has held that, in the context of responding to a posting on a political campaign page maintained on Facebook.com, simply "liking" the post is speech protected by the First Amendment, an analysis with which we agree. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) ("[C]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."). Here, defendant posted the following on Facebook: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? . . . Praise be to GOD, WOW! Thanks JESUS!" If merely "liking" a post on Facebook.com is speech protected by the First Amendment, we have no doubt that posting a message on that site falls within this category as well. Thus, the statutory restrictions on defendant's right to speech on Facebook, while incidental, are not trivial.

Considering next the governmental interest in protecting minors, when "a direct relationship between the regulation and the interest" exists, *Hest*, 366 N.C. at 298, 749 S.E.2d at 436, an incidental burden on speech can be justified if the governmental interest is being furthered, *see Turner Broad. Sys.*, 512 U.S. at 662, 114 S. Ct. at 2469, 129 L. Ed. 2d at 530. Nevertheless, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' " *Id.* at 664, 114 S. Ct. at 2470, 129 L. Ed. 2d at 531 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1995)). Instead, the State must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citations omitted). The State argues that protection of minors from known sexual predators is a vital duty, one this Court has recognized in another context. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing the risk of recidivism among sex offenders).

In considering this balance between the governmental interest and the incidental burden on this defendant's speech, we are mindful of our opinion in *Britt v. State*, in which we were confronted with a challenge to the constitutionality of N.C.G.S. § 14-415.1, which banned all convicted felons from possessing firearms. 363 N.C. 546, 681 S.E.2d 320 (2009). We held that the statute violated the North Carolina Constitution when applied to the plaintiff because his underlying offense (a nonviolent drug crime), his subsequent lawful behavior and demonstrated respect for the law, and his history of

peaceable conduct following his conviction, all gave no indication that he posed any substantial threat to society. *Id.* at 550, 681 S.E.2d at 323. As a result, we concluded that the statute barring the plaintiff from possessing a firearm was "not fairly related" to the governmental purpose for which the statute was enacted, which was "the preservation of public peace and safety." *Id.* The statute was unconstitutional as applied to the plaintiff when prosecution would not further that governmental interest.

As indicated by our analysis in *Britt,* the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case. In ascertaining whether the government's interest in protecting children from registered sex offenders who are lurking on social networking Web sites and gleaning information on potential targets is furthered by prosecution of this defendant, we observe that defendant has the status of a registered sex offender because he was convicted of indecent liberties with a minor, a sex crime against a child falling directly within the purview of section 14-202.5. Officers who searched his home found a signed written notice advising defendant of sites he could not legally access. Defendant set up his Facebook page under an alias, further indicating his awareness that he was indulging in forbidden behavior while simultaneously hiding his identity from investigators and parents. Thus defendant's case is readily distinguishable from *Britt,* in which the plaintiff's underlying conviction for drugs was considerably less directly related to the possession of "sporting rifles and shotguns" than is defendant's indecent liberties conviction to his use of Internet sites frequented by

minors. Moreover, the plaintiff in *Britt* discussed the law's application to him with his local sheriff and thereafter voluntarily divested himself of all firearms before instituting his constitutional challenge to the statute, while defendant here deliberately disguised his identity. *Id.* at 547-48, 681 S.E.2d at 321-22. Unlike the plaintiff in *Britt*, defendant neither demonstrated respect for the law nor made good faith efforts to comply with the statute. These facts satisfy us that the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Thus, N.C.G.S. § 14-202.5 is not an unreasonable regulation and is constitutional as applied to defendant. *Cf. id.* at 550, 681 S.E.2d at 323.

Defendant also argues that N.C.G.S. § 14-202.5 is unconstitutionally overbroad. "In the First Amendment context, . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190 n.6, 170 L. Ed. 2d 151, 160 n.6 (2008)). In *Broadrick v. Oklahoma*, the Court clarified the limited scope of the overbreadth doctrine, explaining that

> the plain import of our cases is, at the very least, that facial overbreadth adjudication is an

> exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L. Ed. 2d 830, 842 (1973). Because the notion of striking a statute at the request of one to whom it otherwise unquestionably applies goes against the grain of "prudential limitations on constitutional adjudication," *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1130 (1982), the Supreme Court of the United States has recognized that the doctrine is "strong medicine" to be administered only with caution and as a "last resort," *id.* at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130 (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 841). A party raising such a challenge "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148, 159 (2003) (alteration in

original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 17 (1988)). When a statute's infringement on speech protected under the First Amendment is marginal, a finding of facial invalidity is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Ferber*, 458 U.S. at 770 n.25, 102 S. Ct. at 3362 n.25, 73 L. Ed. 2d at 1131 n.25 (alterations in original) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2898, 37 L. Ed. 2d 796, 817 (1973)).

In an overbreadth analysis, the reviewing court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008). As detailed above in our analysis of the facial constitutionality of the statute, we see that the statute is drafted carefully to limit its reach by establishing four specific criteria that must be met before access to a commercial social networking Web site is prohibited to a registered sex offender, N.C.G.S. § 14-202.5(b); that the statute exempts sites that are exclusively devoted to speech, *id.* § 14-202.5(c); and that the statute requires the State to prove that a registered sex offender knew the site permitted minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site, *id.* § 14-202.5(a). These factors ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target. Outside these limits, registered sex offenders are free to use the Internet.

Although this statute "may deter protected speech to some unknown extent," *Broadrick*, 413 U.S. at 615, 93 S.C t. at 2917, 37 L.Ed.2d at 842, that effect can be characterized "at best [as] a prediction," *id.*, 93 S.Ct. at 2917-18, 37 L. Ed. 2d at 842, and we "cannot, with confidence, justify invalidating [this] statute on its face," *id.* at 615, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842, and prohibit the State from continuing to enforce a statute protecting such an important government interest, *id.* Given the reluctance with which courts administer the strong medicine of overbreadth, we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate. As in *Broadrick*, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842.

Finally, the State challenges the Court of Appeals holding that the statute is unconstitutionally vague. Laws that are not "clearly defined" are void for vagueness under the Due Process Clause. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *id.* at 108, 92 S. Ct. at 2298-99, 33 L. Ed. 2d at 227, and must also provide sufficient clarity to prevent arbitrary and discriminatory enforcement, *see Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Vague laws chill free speech because "[u]ncertain meanings

inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned,* 408 U.S. at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228 (second alteration in original) (quoting *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S. Ct. 1316, 1323, 12 L. Ed. 2d 377, 385 (1964)).

Vagueness cannot be raised by a defendant whose conduct falls squarely within the scope of the statute. *See Parker v. Levy,* 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439, 458 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *see also Hoffman Estates,* 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). The Court of Appeals "assume[d] that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream commercial social networking sites such as *Facebook.com.*" *Packingham,* __ N.C.App. at __, 748 S.E.2d at 153. Whatever the status of other Web sites, no party disputes that Facebook.com, the site at issue here, falls under N.C.G.S. § 14-202.5's definition of "commercial social networking Web site." While an argument may be made that the statutory term "access" could be vague in other contexts, defendant's logging into his Facebook account and posting a message on his page is unquestionably "accessing" Facebook.com. Defendant's conduct defeats his vagueness claim.

Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

Justice ERVIN did not participate in the consideration or decision of this case.

Justice HUDSON dissenting.

The majority concludes that N.C.G.S. § 14-202.5 (2013), which bars any registered sex offender from accessing any commercial social networking site on which he knows a minor can create or maintain a profile, is constitutional on its face and as applied to defendant. Because I conclude that the statute is unconstitutional on its face, I disagree with the majority's reversal of the Court of Appeals. More specifically, I conclude that section 14-202.5 is not narrowly tailored enough to withstand even intermediate scrutiny and that it is facially overbroad under the First Amendment. Accordingly, I respectfully dissent.

As an initial matter, I agree with the majority opinion to the extent it concludes that N.C.G.S. § 14-202.5, by proscribing access to commercial social networking sites, targets sites which are used for "gathering information and [as] means of communication." However, I do not agree with the later assertion that the statute primarily regulates conduct and places only an "incidental" burden on speech. This statute completely bars registered sex offenders from communicating with others through many widely utilized commercial networking sites. Therefore, in my view, it primarily targets expressive activity usually protected by the First Amendment. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) (observing that previous cases from that Court "provide no basis for qualifying the level of First

Amendment scrutiny that should be applied" to online activities); *see also Brown v. Entm't Merchs. Ass'n*, __ U.S. __, __, 131 S. Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (citation and internal quotation marks omitted)).

The majority finds the "four-factor test from [*United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)] instructive" in applying intermediate scrutiny to what it sees as an "incidental" burden on speech. *O'Brien* involved a regulatory ban on burning of a draft card, which the Court saw as conduct having a "communicative element." *Id.* at 376, 88 S. Ct. at 1678. Because I read *O'Brien* to apply only where the restriction primarily targets expressive conduct, and because the statute at issue here necessarily burdens speech directly, I would not apply *O'Brien's* four-factor test here. *See id.*, 88 S. Ct. at 1678-79 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Instead, I would analyze this statute as one that, by design and in effect, primarily and directly regulates First Amendment-protected activity, not conduct.

Because this statute primarily regulates speech (and other protected activity), I would apply the scrutiny applicable to restrictions on speech. *See, e.g.*, *McCullen v. Coakley*, __ U.S. __, __, 134 S. Ct. 2518,

2530 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28, 130 S. Ct. 2705, 2723–24 (2010). According to these cases, the next step would be to determine whether the statute is content-based or content-neutral. Content-based restrictions are "presumptively unconstitutional" and can stand only if they survive strict scrutiny, the most difficult test in federal constitutional law. *McCullen*, __ [sic] at __, 134 S. Ct. at 2530. In contrast, content-neutral measures that burden speech are subject to a form of intermediate scrutiny—a still difficult but less exacting analysis. *See id.* at __, 134 S. Ct. at 2530.

Here, applying the United States Supreme Court's recent decision in *Reed v. Town of Gilbert*, __ U.S. __, 135 S. Ct. 2218 (2015), the majority concludes that N.C.G.S. § 14-202.5 is a content-neutral burden on conduct only incidentally affecting speech. While I think there is a strong argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites, I do not think we need to resolve this question because I conclude that the law cannot withstand even intermediate scrutiny.

The intermediate scrutiny standard applicable to content-neutral regulations on speech requires the government to demonstrate, *inter alia*, that the restriction is "narrowly tailored to serve a significant governmental interest." *McCullen*, __ U.S. at __, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S. Ct. 2746, 2756 (1989)). More specifically,

> [f]or a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate [and significant] interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at __, 134 S. Ct. at 2535 (citations and internal quotation marks omitted). In short, when a statute "burden[s] substantially more speech than necessary to achieve the [government's] asserted interests," it will fail this form of intermediate scrutiny. *Id.* at __, 134 S. Ct. at 2537. Here, there is no dispute that the State's purported concern—protecting minors from exploitation by registered sex offenders using the Internet—qualifies as a legitimate and significant government interest. The central question, then, is whether section 14-202.5 "burden[s] substantially more speech than necessary" in support of that interest. *Id.* at __, 134 S. Ct. at 2537.

I conclude that it does. First, the statute as written sweeps too broadly regarding who is subject to its prohibitions. As noted, the State's interest here is in protecting minors from registered sex offenders using the Internet. However, this statute applies to *all* registered offenders. *See* § 14-202.5(a) ("It is unlawful for a [registered] sex offender... to access a commercial social networking Web site where the sex offender

knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site."). The statute is not restricted in application only to those whose offenses harmed a minor or in some way involved a computer or the Internet, nor to those who have been shown to be particularly violent, dangerous, or likely to reoffend. This statute therefore groups together, without distinction, offenders whose history and past conduct directly implicate the State's concerns with those who do not. To the extent the statute does so, it "burden[s]... more speech than necessary to achieve the [State's] interests." *McCullen*, __ U.S. at __, 134 S. Ct. at 2537.

Second, as written, the statute also sweeps far too broadly regarding the activity it prohibits. The majority asserts that the statute prohibits "registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." But in fact, the statute contains no such limitation. Section 14-202.5 defines the term "commercial social networking Web site" as a website that (1) is operated by someone who derives revenue from the site; (2) facilitates "social introduction" or "information exchanges" between two or more people; (3) allows users "to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, [or] other personal information about the user... that may be accessed by other users or visitors" to the site; and (4) provides "users or visitors mechanisms to communicate with other users." N.C.G.S. § 14-202.5(b). I note in particular that the statute's description of a "personal

profile [ ]," and the language "such as" when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. As a result, this definition clearly includes sites that are normally thought of as "social networking" sites, like Facebook, Google+, LinkedIn, Instagram, Reddit, and MySpace. However, the statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*. *See The News & Observer Terms of Service*, http://www.newsobserver.com/customer-service/terms-of-service/ (last visited Oct. 22, 2015) (stating that "[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian" but not limiting registration on the site to adults). Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon[1] and Google.

In short, however legitimate–even compelling–the State's interest in protecting children might be, the plausible sweep of the statute as currently written

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[1] The statute does except from this definition any website that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services *between its members or visitors*." N.C.G.S. §14-202.5(c)(2) (emphasis added). However, as defendant argues, "Amazon's primary purpose is to facilitate transactions *between Amazon itself and its visitors*, not between users of the Web site and other users." (Emphasis added.) Accordingly, it appears that this exception does not actually apply to websites like Amazon, but only covers websites like Craigslist or eBay.

"create[s] a criminal prohibition of alarming breadth," *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), and extends well beyond the evils the State seeks to combat. I therefore conclude that N.C.G.S. § 14-202.5 "burden[s] substantially more speech than necessary to achieve the [State's legitimate] interests," *McCullen*, __ U.S. at __, 134 S. Ct. at 2537, and cannot survive even the intermediate scrutiny applied to content-neutral restrictions on speech.

In addition, for similar reasons, I conclude that this statute is also facially overbroad under the First Amendment. The overbreadth inquiry is very similar to the "narrow-tailoring" inquiry described above: First Amendment overbreadth doctrine requires a court to invalidate a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). There is, however, one important nuance. Namely, while the Supreme Court of the United States has often invalidated specific applications of statutes under as-applied challenges, *see, e.g., McCullen*, __ U.S. at __, 134 S. Ct. at 2528, 2541, that Court has also made clear that First Amendment doctrine specifically permits litigants to make facial challenges based on overbreadth, *see, e.g., Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587 ("In the First Amendment context, however, this Court recognizes a second type of *facial* challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (emphasis added) (citation and internal quotation marks omitted)); *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838 ("According to our First

Amendment overbreadth doctrine, a statute is *facially invalid* if it prohibits a substantial amount of protected speech." (emphasis added). The Court has even noted that such a challenge is permitted when the challenger's own conduct would clearly fall within the scope of the statute's prohibition and the claim is based only on how that statute might apply to the activity of others. *See, e.g., Humanitarian Law Project*, 561 U.S. at 20, 130 S. Ct. at 2719 ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. [But s]uch a plaintiff may have a valid overbreadth claim under the First Amendment. . . ."). In light of this precedent permitting such challenges, and for the reasons noted above, I would hold that the statute at issue here, N.C.G.S. § 14-202.5, is facially overbroad and therefore unconstitutional, regardless of its application in this specific case.

For the foregoing reasons, I conclude that N.C.G.S. § 14-202.5 is both insufficiently narrowly tailored to satisfy intermediate scrutiny and facially overbroad under the First Amendment. Because I disagree with the majority's conclusions to the contrary, I respectfully dissent.

Justice BEASLEY joins in this opinion.

No. COA12-1287

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH
CAROLINA

v.

Durham County

No. 10 CRS 57148
LESTER GERARD
PACKINGHAM

Appeal by defendant from judgment entered 30 May 2012 by Judge William Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

Lester Gerard Packingham (defendant), a registered sex offender, appeals from a judgment entered upon a jury conviction for accessing a commercial social networking Web site, pursuant to N.C. Gen. Stat. § 14-202.5 (2011). Defendant

challenges the statute as unconstitutional. For the reasons stated herein, we agree. Accordingly, we vacate the judgment of the trial court.

I. Background

Chapter 14, Article 27A of our general statutes governs the Sex Offender and Public Protection Registration Programs (the Registry). "The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat § 14-208.5 (2011). Accordingly, the stated purpose of the Registry is to protect the public and children from the risk of recidivism by sex offenders and to aid "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders" because sex offenders "pose significant and unacceptable threats to the public safety and welfare of children." *Id.*

As part of the Registry, persons convicted on or after 1 January 1996 of sexually violent offenses or certain offenses against minors must register as a sex offender. In doing so, they must provide the sheriff's office in the county in which they reside with all pertinent personal information set forth in N.C. Gen. Stat. § 14-208.7(b) (2011). "Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14.208.12A." N.C. Gen. Stat. § 14-208.7(a) (2) (2011). Alternatively, "[a]ny

person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator" is required to register under the Sexually Violent Predator Registration Program. N.C. Gen. Stat. § 14-208.6A (2011). A violation of the registration requirements is a Class F felony. N.C. Gen. Stat. § 14-208.11 (2011).

On 1 December 2008, the General Assembly enacted N.C. Gen. Stat. § 14-202.5 as part of the Protect Children from Sexual Predators Act. NC B. Summ., 2008 Reg. Sess. S.B. 132. The statute bans the use of commercial social networking Web sites by any registered sex offender:

> (a) Offense. -- It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.
>
> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purpose of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. -- The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

> (e) Punishment. -- A violation of this section is a Class I felony.

N.C. Gen. Stat. § 14-202.5 (2011).

In the case *sub judice,* defendant was convicted of taking indecent liberties with a child in 2002. Accordingly, he became a registered sex offender. In 2010, in an effort to enforce N.C. Gen. Stat. § 14-202.5, the Durham Police Department began investigating profiles on the Web sites Myspace.com and Facebook.com for evidence of use by registered sex offenders. An officer recognized defendant in a profile picture belonging to Facebook user "J.R. Gerard," then confirmed that defendant was the person who created the profile page. Thereafter, defendant was indicted on 20 September 2012 for maintaining at least one personal Web page or profile on Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.

At a pretrial hearing, defendant moved to dismiss the charge on the basis that N.C. Gen. Stat. § 14-202.5 was unconstitutional. The trial court joined defendant's motion with a similar motion made by another defendant. Superior Court Judge Michael R. Morgan denied the joint motion, finding that the statute was constitutional as applied to both defendants. He declined to rule on the statute's facial constitutionality for want of jurisdiction. Defendant in the case *sub judice,* and the other defendant, filed a joint appeal with this Court, which we denied on 22 June 2011.

On 30 May 2012, a jury found defendant guilty of accessing a commercial social networking Web site.

Defendant was sentenced to 6 to 8 months imprisonment, suspended, and placed on 12 months of supervised probation. Defendant now appeals.

II. Analysis

On appeal, defendant challenges N.C. Gen. Stat. § 14-202.5 (2011) on the basis that it violates his federal and state constitutional rights to free speech, expression, association, assembly, and the press under the First and Fourteenth Amendments. Additionally, he asserts that the statute is overbroad, vague, and not narrowly tailored to achieve a legitimate government interest. We agree.

This case presents the single legal question of whether N.C. Gen. Stat. § 14-202.5 is unconstitutional. "The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *State v. Daniels*, __ N.C.App. __, __, 741 S.E.2d 354, 363 (2012), *appeal dismissed, review denied*, 738 S.E.2d 389 (N.C.2013) (internal quotations and citations omitted).

A. Level of Scrutiny

The statute plainly involves defendant's First Amendment rights as incorporated through the Fourteenth Amendment because it bans the freedom of speech and association via social media. "[A] statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea." *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840

(1993) (quotation marks and citations omitted). N.C. Gen. Stat. § 14-202.5 (2011) is content neutral because it restricts access to commercial social networking Web sites without any reference to the content or type of speech disseminated or posted thereon. *See Turner Broad. Sys. v. FCC,* 512 U.S. 622, 641-42, 129 L.Ed.2d 497 (1994). Content-neutral regulations are subject to intermediate scrutiny: they must be both "narrowly tailored to achieve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 105 L.Ed.2d 661, 675 (1989). In the instant case, we conclude that the statute is not narrowly tailored; accordingly, we decline to address whether the statute leaves open alternative channels for communication. *See Doe v. Prosecutor,* 705 F.3d 694, 698 (7th Cir. 2013).

B. Narrow Tailoring

The U.S. Supreme Court has stated that a narrowly tailored statute "targets and eliminates no more than the exact source of the evil it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz,* 487 U.S. 474, 485, 101 L.Ed.2d 420, 485 (1988) (citation omitted).

> [T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . So long as the means chosen are not substantially broader than necessary to

> achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 799-800, 105 L.Ed.2d at 680-81 (quotation marks and citations omitted). The State must also "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664, 129 L.Ed.2d at 532.

At the outset, we note that this is the first constitutional challenge to N.C. Gen. Stat. § 14-202.5 heard before this Court. As such, we find several federal court decisions addressing the constitutionality of similar statutes to be persuasive. Most recently, in *Doe v. Prosecutor*, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit declared Indiana Code § 35-42-4-12 (2011) to be unconstitutional: the statute prohibited registered sex offenders convicted of offenses involving a minor (including, *inter alia*, child molesting, possession of child pornography, and sexual conduct in the presence of a minor) from using social networking websites, instant messaging services, and chat programs. It defined a "social networking web site" as a Web site that:

> (1) facilitates the social introduction between two (2) or more persons;

> (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
>
> (3) allows a member to create a web page or a personal profile; and
>
> (4) provides a member with the opportunity to communicate with another person.
>
> The term does not include an electronic mail program or message board program.

Ind. Code Ann. § 35-42-4-12 (2011). Additionally, the statute provided a defense to a prosecution if the registered offender:

> (1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
>
> (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.

Id. Calling the statute "overinclusive" and a complete "social media ban," the Seventh Circuit concluded that, though content neutral, the statute was not narrowly tailored to serve the state's interest because it broadly prohibited substantial protected speech rather than specifically targeting the evil of improper communications to minors:

> [T]here is nothing dangerous about Doe's use of social media as long as he does not improperly

> communicate with minors. Further, there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress.

Prosecutor, 705 F.3d at 698-99.

Similarly, Nebraska statute Neb.Rev.Stat. § 28-322.05(1) (2012) made it unlawful for certain registered sex offenders "to knowingly and intentionally use[ ] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use [it]." Neb.Rev.Stat. § 28-322.05(1) (2012). Only those registered offenders convicted of offenses targeting minors were subject to the statutory ban. *See* Neb.Rev.Stat. § 29-4001.01(13) (2012). The statute defined a "social networking web site" as:

> [A] web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile[.]

Neb.Rev.Stat. § 29-4001.01(13) (2012).

Upon review, the U.S. District Court in Nebraska held that Neb.Rev.Stat. § 28-322.05 was not narrowly tailored because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Doe v. Nebraska*, 898 F.Supp.2d 1086, 1112 (D. Neb. 2012) (citation omitted) (alteration in original). The District Court reasoned that, even if the ban was applicable only to the most common and notable social networking sites, such as Facebook.com and Myspace.com, it nevertheless prohibited an enormous amount of expressive activity on the internet: "[T]he ban potentially restricts the targeted offenders from communicating with hundreds of millions and perhaps billions of adults and their companies despite the fact that the communication has nothing whatsoever to do with minors." *Id.* at 1111; *see also Doe v. Jindal*, 853 F.Supp.2d 596, 607 (M.D. La. 2012) (holding that La. Rev. Stat. Ann. § 14:91.5 (2012) was unconstitutional, in part because "[t]he sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued.").

C. Legitimate State Interest

Turning now to the case at hand, it is undisputed that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet. North Carolina requires sex offenders to

register in the sex offender database because "the protection of [ ] children is of great governmental interest." N.C. Gen. Stat. § 14-208.5 (2011). However, while enacted to further a legitimate state interest, N.C. Gen. Stat. § 14-202.5, as it stands, is not narrowly tailored.

i. Substantially Broad Application

First, defendant argues that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, in part

> because it treats all registered sex offenders the same, regardless of the offense committed, the victim's age, whether a computer was used to facilitate or commit the offense, the likelihood of reoffending, and regardless of whether the person has been classified as a sexually violent predator. It burdens more people than needed to achieve the purported goal of the statute.

We agree. We begin by noting that Article 27A demonstrates the legislature's intent to distinguish between sex offenders based on the character of their convictions:

> It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

N.C. Gen. Stat. § 14-208.6A (2011). Accordingly, our

general statutes contain various restrictions that are only applicable to specified subsets of sex offenders. *See* N.C. Gen. Stat. § 14-208.18(c) (2011) (governing premises restrictions that apply only to registered sex offenders who commit an offense defined in Article 7A or against a child under the age of 16); N.C. Gen. Stat. § 14-208.22 (2011) (requiring only offenders classified as "sexually violent predators" to provide additional identifying factors, offense history, and documentation of psychiatric treatment); N.C. Gen. Stat. § 14-208.23 (2011) (requiring only "sexually violent predators" to register for life); N.C. Gen. Stat. § 14-208.40A (2011) (allowing courts to implement satellite-based monitoring if (i) the offender has been classified as a sexually violent predator (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.).

In contrast, N.C. Gen. Stat. § 14-202.5 applies equally to every registered sex offender in the state, regardless of whether the offender committed any sexual offense involving a minor. For example, registered sex offenders convicted of misdemeanor sexual battery of an adult, pursuant to N.C. Gen. Stat. § 14-27.5A (2011), and those convicted of attempted rape of an adult, pursuant to N.C. Gen. Stat. § 14-27.6 (2011), may not access any commercial social networking Web site. Thus, the application of this statute is neither conditional upon showing that the offender previously used a social networking Web site to target children, nor does it require a showing that the offender is a current threat to minors.

Accordingly, the statute is not narrowly tailored because it fails to target those offenders who "pose a factually based risk to children through the use or threatened use of the banned sites or services." *Nebraska,* 898 F.Supp.2d at 1111. In essence, it burdens more people than necessary to achieve its purported goal.

We note that in *Doe v. Prosecutor* and *Doe v. Nebraska,* the challenged statutes were applicable only to those registered sex offenders whose offenses involved a minor. Nevertheless, the courts concluded that the statutes were not narrowly tailored, in part, because they also banned a broad scope of internet activity. As such, tailoring N.C. Gen. Stat. § 14-202.5 to those offenders who "pose a factually based risk to children" does not cure the statute's fatal flaw. *Nebraska,* 898 F.Supp.2d at 1111. Its overbroad application to all registered sex offenders is merely one example of how, when judged against the First Amendment, N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, and thus unconstitutional.

ii. Substantially Broad Scope

Defendant asserts that an additional First Amendment concern is the fact that N.C. Gen. Stat. § 14-202.5 arbitrarily prohibits a broad scope of internet activity. We agree.

"Expansively written laws designed to protect children are *not* exempt from the constitutional requirement of clarity under both the First Amendment and the Due Process Clause[.]" *Id.* at 1112. Due process requires that laws give people of ordinary intelligence fair notice of what conduct is

prohibited. *Grayned v. City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222 (1972).

> The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. . . . [G]overnment may regulate in the area of First Amendment freedoms only with narrow specificity[.] These principles apply to laws that regulate expression for the purpose of protecting children.

Brown v. Entm't Merchs. Ass'n, 2011 U.S. 4802 [*sic*], 37-38, 180 L.Ed.2d 708, 725 (2011) (quotations and citations omitted). Vague criminal statutes are disfavored because they restrict the exercise of First Amendment freedoms. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 138 L.Ed.2d 874 (1997).

Here, the State fails to make a convincing argument as to why the statute is not unconstitutionally vague. N.C. Gen. Stat. § 14-202.5(b) defines "social networking Web site[s]" as being 1) "commercial" in that they "derive [ ] revenue," 2) "social" because they promote the introduction of individuals, and 3) facilitative of "networking" by allowing users to create personal profiles or have mechanisms that allow users to communicate with others, "such as message board[s], chat room[s], electronic mail, or instant messenger." N.C. Gen. Stat. § 14-202.5(b) (2011). N.C. Gen. Stat. § 14-202.5(c) provides two exceptions: 1) an offender may access a Web site that provides one discrete service, including photo-sharing, electronic mail, instant messenger, chat room or message board, or 2) he may

visit a Web site that is primarily intended to facilitate commercial transactions between members or visitors. N.C. Gen. Stat. §14-202.5(c) (1-2) (2011).

The construction of N.C. Gen. Stat. § 14-202.5(b) lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited. We assume that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as Facebook.com and Myspace.com. However, the ban is much more expansive. For example, while Foodnetwork.com contains recipes and restaurant suggestions, it is also a commercial social networking Web site because it derives revenue from advertising, facilitates the social introduction between two or more persons, allows users to create user profiles, and has message boards and photo sharing features. Additionally, the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com because these sites contain subsidiary social networking pages: they derive revenue from advertising; their functions facilitate the social introduction of two or more people; and they allow users to create personal profiles, e-mail accounts, or post information on message boards. Thus, registered sex offenders may be prohibited from conducting a "Google" search, purchasing items on Amazon.com, or accessing a plethora of Web sites unrelated to online communication with minors. In its overall application, the statute prohibits a registered sex offender whose conviction is unrelated to sexual activity involving a minor from accessing a multitude of Web sites that, in all likelihood, are not frequented

by minors.

Furthermore, while the definition of "commercial social networking Web site" in N.C. Gen. Stat. § 14-202.5(b) is overbroad and vague on its face, N.C. Gen. Stat. §14-202.5(a) is similarly vague. This portion of the statute makes it unlawful for the offender to "access" a Web site where he "knows" that the site permits minor children to become members. The term "access" is defined as "[t]he act of approaching." *American Heritage Dictionary* 8 (3ed.1997). Accordingly, the statute is violated by merely pulling up a prohibited Web site, regardless of whether the offender searches the site or immediately leaves it upon recognizing that he is banned from its use. Furthermore, by its plain language, it is assumed that every offender inherently "knows" which Web sites are banned. However, given the vague definition of "commercial social networking Web site" and its broad reach, it is fundamentally impossible to expect an offender, or any other person, to "know" whether he is banned from a particular Web site prior to "accessing" it. Moreover, N.C. Gen. Stat. § 14-202.5 contains no defense to prosecution should a sex offender unintentionally access a banned Web site. Finally, should a registered sex offender have active Facebook, Amazon, or other accounts at the time of his conviction, the plain language of N.C. Gen. Stat. § 14-202.5 makes it unlawful to login to close the accounts. Accordingly, we conclude that N.C. Gen. Stat. § 14-202.5 is unconstitutionally vague on its face and overbroad as applied.

D. Additional Safeguards

Finally, we note that our General Assembly has

enacted laws aimed at protecting children on the internet without abridging First Amendment freedoms: N.C. Gen. Stat. § 14-202.3 (2011) prohibits solicitation of a child by a computer or other electronic device to commit an unlawful sex act; N.C. Gen. Stat. § 14-196.3 (2011) prohibits cyber-stalking; and Article 27A requires registered sex offenders to provide the State with "[a]ny online identifier the person uses or intends to use," N.C. Gen. Stat. § 14-208.7(b)(7) (2011). Accordingly, "[w]ith little difficulty, the state could more precisely target illicit communication, as the statutes above demonstrate." *Prosecutor*, 705 F.3d at 700.

III. Conclusion

In sum, we conclude that N.C. Gen. Stat. § 14-202.5 is not narrowly tailored, is vague, and fails to target the "evil" it is intended to rectify. Instead, it arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal. The statute violates the First Amendment's guarantee of free speech, and it is unconstitutional on its face and as applied. Accordingly, we vacate the trial court's judgment.

VACATED.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA JUSTICE COURT COUNTY OF DURHAM	IN THE GENERAL COURT OF SUPERIOR DIVISION FILE NOS: 10 CRS 57146, 10 CRS 57148
STATE OF NORTH CAROLINA v. CHRISTIAN MARTIN JOHNSON and LESTER GERARD PACKINGHAM, Defendants.	**ORDER**

THIS MATTER coming to be heard before the undersigned presiding Superior Court Judge sitting in criminal session for the County of Durham, upon the defendants' Motions to Declare N.C.G.S. § 14-202.5 Unconstitutional, and having heard evidence and arguments of counsel for the defendant and the State, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Christian Martin Johnson (hereinafter "defendant Johnson") was represented by Glenn Gerding, Esq.
2. Lester Gerard Packingham (hereinafter "defendant Packingham") was represented by Lynn Norton-Ramirez, Esq.
3. The State of North Carolina was represented by Assistant District Attorney Mark McCullough.
4. On September 20, 2010, defendants Johnson and Packingham were indicted by the Durham County Grand Jury for use of a Commercial Social Networking Web Site by a Sex Offender.
5. The indictment in 10 CRS 57146 alleges that on February 3, 2010, defendant Johnson maintained one or more Web pages on the commercial social networking Web site MySpace.com in violation of N.C. Gen. Stat. § 14-202.5.
6. The indictment in 10 CRS 57146 further alleges defendant Johnson was convicted of Taking Indecent Liberties with a Child in the Superior Court of Franklin County on September 30, 2008, which requires defendant Johnson to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.
7. On December 30, 2010, defendant Johnson filed a Motion to Declare N.C.G.S. § 14-202.5 Unconstitutional, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against defendant Johnson.

8. The indictment in 10 CRS 57148 alleges that on or about May 22, 2010, defendant Packingham maintained one or more Web pages on the commercial social networking Web site Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.

9. The indictment in 10 CRS 57148 further alleges defendant Packingham was convicted of Taking Indecent Liberties with a child in the Superior Court of Cabarrus County on September 22, 2002, which requires defendant Packingham to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.

10. On December 9, 2010, defendant Packingham filed a Motion to Dismiss for Unconstitutionality of the Statute, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against him.

11. The interests of both defendants Johnson and Packingham are so aligned as to their respective positions that N.C. Gen. Stat. § 14-202.5 is unconstitutional based upon legal authorities upon which they respectively and jointly rely that these matters have been joined for the purpose of presentation of evidence, the submission of constitutional, statutory and case law authorities and the arguments of counsel.

12. The State and both defendants Johnson and Packingham respectively agree that the Web sites at issue in the above-captioned cases, namely

MySpace.com and Facebook.com, are commercial social networking Web sites as contemplated by N.C. Gen. Stat. § 14-202.5.

13. Both defendants Johnson and Packingham, in their motions and orally through their respective counsel, contend that N.C. Gen. Stat. § 14-202.5 is unconstitutional on its face and as applied to each of the named defendants.

14. The Court's determination of the constitutionality of N.C. Gen. Stat. § 14-202.5 as applied is an express request of each named defendant respectively.

15. While the parties have provided studious and insightful analysis concerning, among other things, the treatment of an Internet Web site under the statute which has as its primary purpose the facilitation of commercial transactions involving the goods or services between its members or visitors, yet has subpages similar to MySpace.com and Facebook.com; the treatment of computer search engines like Google, which has subpages similar to MySpace.com and Facebook.com; the treatment of governmental, quasi-governmental, religious, educational, medical and sports Web sites which have social networking components similar to MySpace.com and Facebook.com and a host of thoughtful hypothetical situations for contemplation, including the charging officer, Corporal Brian Schnee's, reflection on such hypotheticals to elicit his own views on the statute's meaning, much of this intellectual analysis is not relevant to, nor dispositive of, the legal issues to be considered by

the Court regarding whether the pending criminal charges against the named defendants should be dismissed due to the claimed unconstitutionality of N.C. Gen. Stat. § 14-202.5 as the statute has been applied to them.

16. Both defendants Johnson and Packingham were convicted sex offenders registered in accordance with the provisions of Article 27A, Chapter 14 of the North Carolina General Statutes at the time they allegedly committed the indicted offenses.

17. Based upon the testimony of the charging officer, Corporal Brian Schnee of the Durham Police Department, and the items contained in Defendant's Exhibits #1 and #3, the Court finds that, for the purposes of determining the constitutionality of the application of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, MySpace.com and Facebook.com are commercial social networking Web sites within the meaning of N.C. Gen. Stat. § 14-202.5(b).

18. Based upon the testimony of the charging officer, the items contained in Defendants' Exhibits #1 and #3 and the agreement between the parties presented in closing arguments, the Court finds that, for the purposes of determining the constitutionality of N.C. Gen. Stat. § 14.-202.5 to defendants Johnson and Packingham, MySpace.com and Facebook.com are commercial social networking Web sites which allow persons aged less than 16 years to become members and/or create or maintain Web pages thereon.

19. Based upon the testimony of the charging officer

and the items contained in Defendants' Exhibits #1 and #3, the Court finds that, for purposes of determining the constitutionality of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, neither MySpace.com nor Facebook.com are Internet Web sites which fall within the exceptions contemplated by N.C. Gen. Stat. § 14-202.(c).

a. Specifically, neither MySpace.com nor Facebook.com provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform.

b. Further, neither MySpace.com nor Facebook.com has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

CONCLUSIONS OF LAW

1. The Court derives jurisdiction over these matters by virtue of pending criminal charges against defendants Johnson and Packingham related to their alleged maintenance of one or more Web pages on a commercial social networking Web site as outlined above.

2. In the spirit of the wisdom oft displayed by the North Carolina appellate courts to determine the specific legal questions to be decided, this trial Court, in recognizing that its jurisdiction is derived from the pending criminal charges against the defendants for maintaining one or more personal Web pages on commercial social

networking Web sites, agreed by the parties to be such Web sites, will decide the specific legal questions which determine whether the defendants' charges should be dismissed due to the manner in which N.C. Gen. Stat. § 14-202.5 has been applied to each of them, and conversely will refrain from deciding whether the provisions of N.C. Gen. Stat. § 14-202.5 render it unconstitutional when all of its provisions have not been invoked under the charges, which give the trial Court its narrow jurisdiction.

3. The North Carolina Supreme Court has said, "[We] emphasize that the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather, this Court must measure the balance struck by the legislature against the required minimum standards of the constitution." State v. Bryant, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005).

4. The disparate interests which are balanced in the current cases by the legislature, which this Court is to measure, are the activities of sex offenders on the one hand and the protection of minors on the other hand.

5. In measuring this "balance struck by the legislature against the required minimum standards of the constitution," as the standard enunciated by the Supreme Court in Bryant, this trial Court recognizes the legislature's enactment of N.C. Gen. Stat. § 14-208.5, the introduction to

Chapter 14, Article 27A of the General Statutes regarding the North Carolina Sexual Offender and Public Protection Registration Programs, which states the following as the purpose:

> "The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount government interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about those offenders will further governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who

are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offerings to others as provided in this Article."

6. In applying the Bryant standard, this trial Court also notes the first paragraph of the Supreme Court's opinion rendered in that case:

> "Convicted sex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. State v. Bryant, 359 N.C. at 554, 614 S.E.2d at 479 (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L.Ed. 2d 98, 103, 123 S. Ct. 1160 (2003) (internal quotations omitted). Because of this public safety concern North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders." Id.

7. The High Court also stated in Bryant that "the twin aims of North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are clearly legitimate and of great importance to the State." Bryant at 560, 483.

8. The Supreme Court having found in Bryant that "the twin aims of the North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are cldarly legitimate and of great importance to the State," that "the victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" and that the Court must "measure the balance struck by the legislature against the required minimum standards of the constitution," while understanding that "the role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials," this Court is to be guided by these principles enunciated by the State's highest Court in determining whether N.C. Gen. Stat. § 14-202.5 has been applied in an unconstitutional fashion against defendants Johnson and Packingham.

9. In light of the legal authorities cited, and applying their operation to the substantive and procedural facts presented in the case at bar, while enlightened by counsel and their respective arguments, this Court finds that:

    a. The protection of minors is a legitimate and important aim of the North Carolina Sex Offender and Public Protection Registration Program as enacted by the General Assembly of North Carolina.

    b. The General Assembly, as this State's legislature, is empowered and authorized to enact laws to facilitate the legitimate and

important aim of protecting minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

c. N.C. Gen. Stat. § 14-202.5 is a statutory law enacted by the legislature to facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

d. The role of the legislature is to balance the weight to be afforded disparate interests and to forge a workable compromise among those interests.

10. In the provisions of N.C. Gen. Stat. § 14-202.5, the legislature has balanced the weight to be afforded the disparate interests involved, specifically the activities of sex offenders and the protection of minors, in such a way as to forge a workable compromise among those interests.

11. In measuring the balance struck by the legislature against the required minimum standards of the Constitution, this Court does not find the application of N.C. Gen. Stat. § 14-202.5 to the facts and circumstances in defendants Johnson's and Packingham's cases is unconstitutional.

12. In analyzing the application of N.C. Gen. Stat. § 14-202.5 to the actions of the authorities and entities responsible for the institution of criminal charges against defendants Johnson and Packingham in their respective pending cases, this Court does not find the application of N.C. Gen.

Stat. § 14-202.5 to the facts and circumstances of defendants Johnson's and Packingham's respective cases is unconstitutional.

NOW THEREFORE IT IS ADJUDGED, ORDERED AND DECREED that N.C. Gen. Stat. § 14-202.5 is not unconstitutional as applied to defendant Christian Martin Johnson and Lester Gerard Packingham in their respective pending criminal cases and that, therefore, each of their respective motions to dismiss the charges pending against them for alleged violations of N.C. Gen. Stat. § 14-202.5 is hereby DENIED.

An oral ORDER to this effect being entered upon the record on the 7th day of April 2011, this written ORDER is hereby entered this the 11th day of April 2011, nunc pro tunc to the 7th day of April 2011.

/s/

The Honorable Michael R. Morgan
Superior Court Judge Presiding

N.C.G.S. § 14-202.5

(a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction.—The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originnates in the State or is received in the State.

(e) Punishment.—A violation of this section is a Class I felony.